Supreme Court, U.S.
FILED
02 552 SEP 4 - 2002
OFFICE OF THE CLERK

(1)

SUPREME COURT OF THE UNITED STATES

NO.

GLORIA B. MARTELLO
Plaintiff

VS.

TOWN OF FERRIDAY, OWEN & WHITE, INC.
And US FILTER WASTEWATER GROUP, INC.
Defendants

Petition for Writ of Certiorari to the Court of Appeals of Louisiana, Third District

---

A CIVIL ACTION

APPLICATION OF THE TOWN OF FERRIDAY FOR A WRIT OF CERTIORARI OR REVIEW

STACY C. AUZENNE, P.L.C. (#21995)
RANDALL B. KEISER, P.L.C. (#20894)
PAUL BOUDREAUX, JR., P.L.C. (#3303)
KEISER, AUZENNE & BOUDREAUX, L.L.C.
Attorneys at Law
P.O. Box 12358
Alexandria, Louisiana 71315-2358
Telephone:(318) 443-6168
Attorneys for the Town of Ferriday, Applicant

40 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Trial Court, Court of Appeal and Louisiana Supreme Court err when they failed to grant writ applicant's Exceptions of No Right and No Cause of Action based on Discretionary Act Immunity, before certifying the class action?

2. Is writ applicant, the **Town of Ferriday,** immune from liability for its performance of a discretionary function, namely operating a water treatment plant for its town residents?

3. Is the analysis required of District Courts into the predominance and superiority requirements of **Article 591(B)(3) of the Louisiana Code of Civil Procedure** sufficiently made without considering whether the class action effectuates substantive law, judicial economy, and individual fairness?

4. Does the Substantive Law of Louisiana allow for the recovery of emotional damages for aggravation, annoyance, and inconvenience, experienced by a class of Town residents, students, and employees who had to boil drinking water during a four month Boil Notice, but who have sustained no physical injury or illness?

5. Does a District Court properly exercise its discretion, within the framework of **Article 591**, in certifying a class of persons whose only damages are emotional, unaccompanied by physical injury, without conducting a rigorous inquiry into every aspect of the case, including the substantive elements of each asserted cause of action and each affirmative defense applicable to the claims?

6. Do the common issues of defendants' alleged fault predominate over the individual issues when the

substantive elements of the claims of the vast majority of the class members, involving inconvenience and annoyance without physical injury, can only be determined by an examination of the special circumstances surrounding each claim?

7. Do the common issues of defendants' alleged fault predominate when the causes of action assert legal theories that raise individual issues of fraud, standing, reliance, knowledge and prescription?

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

Defendant and writ applicant, the Town of Ferriday, is a political subdivision located in Concordia Parish, Louisiana.

Plaintiff, Gloria Martello is a natural person residing in Ferriday, Concordia Parish, Louisiana, and is the sole proprietor of Brocato's Restaurant located in Ferriday, Louisiana. Mrs. Martello is represented by Ms. Linda Harang, Ms. Julie Jacobs, and Mr. Steven Murray of the Murray Law Firm in New Orleans, and Mr. Charles Norris of Vidalia, Louisiana.

Co-Defendants, Owen & White Engineers, Inc., Mr. Eugene Owen, Mr. Roy Waggenspack, and Mr. Peter Randy Hollis, individually, are principals of an engineering firm located in Baton Rouge, East Baton Rouge Parish, Louisiana. Owen & White Engineers are represented by Mr. Stephen Wilson, Mr. John Wolff and Mrs. Nancy Gilbert of the Keogh, Cox & Wilson Law Firm in Baton Rouge, Louisiana.

Co-Defendant, US Filter Wastewater Group is the successor corporation of Neptune Microfloc Corporation, which sold a pre-packaged water plant to the Town of Ferriday on the recommendation of the Owen & White Engineers. US Filter Wastewater Group was recently purchased by Vivendi, a Corporation believed to be chartered under the laws of France. US Filter Wastewater Group is represented by Mr. Robert Kerrigan, Mr. Victor Franckiewicz, and Mr. Joseph McReynolds of the Deutsch, Kerrigan & Stiles Law Firm, of New Orleans, Louisiana.

APPENDIX/CITATIONS OF OPINIONS BY LOWER COURTS

Appendix A	Judgment of the District Court, signed July 25, 2001, Civil Action: 36,358-A, 7th Judicial District Court, Concordia Parish, Louisiana.
Appendix B	Written Reasons of the District Court, signed July 25, 2001, Civil Action: 36,358-A, 7th Judicial District Court, Concordia Parish, Lousiana.
Appendix C	Decision of the Third Circuit Court of Appeal on original Application dated March 6, 2002 ***Martello v. City of Ferriday, 01-1240 (La. App. 3 Cir. 3/6/02) 2002 WL 356167***
Appendix D	Decision of the Third Circuit Court of Appeal upon the Town's Application for Rehearing dated May 1, 2002, Docket No. 01 01240-CA.
Appendix E	Writ Application denial by Louisiana Supreme Court on Class Certification and Discretionary Act Immunity issues dated June 7, 2002, No. 2002-C-1514.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW ii

RULE 29(6) CORPORATE DISCLOSURE STATEMENT ... iv

CITATIONS OF OPINIONS BY LOWER COURTS v

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES viii

STATEMENT OF JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 5

(1) Allegations of the Lone Plaintiff 5

(2) The Certification Hearing 6

(3) The Judgment 11

(4) Post-Certification Amendments to the Petition and Recusal 13

SUMMARY OF ARGUMENT 14

ARGUMENT 15

(1) The discretionary policy making decisions implicating budgetary priorities of a Town to provide services to its citizens is protected by Discretionary Act Immunity 15

(a) The Town of Ferriday's argument that it is entitled to Discretionary Act Immunity was never fully considered by any Court in this matter 20

(2) This case is not suitable as a class action because it does not advance or preserve the intertwined goals of effectuating substantive law, judicial efficiency, and avoiding undesirable and unfair results to the parties 25

CONCLUSION 27

VERIFICATION and CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

STATUTES:

Acts 1997, No. 839, Sect. 1, eff. July 1, 1997 25

La. Civil Code, Article 667 21

La. Civil Code, Article 668 21

La. Code of Civil Procedure, Article 1562 12

La. Code of Civil Procedure, Article 1736 12

La. Code of Civil Procedure, Article 591 ..... 3, 6, 14, 26

La. Code of Civil Procedure, Article 591A(1) 11

La. Code of Civil Procedure, Article 591A(3) 11

La. Code of Civil Procedure, Article 591A(4) 11

La. Code of Civil Procedure, Article 591B(3) 11

La. Code of Civil Procedure, Article 591B(1)(b) 5, 6, 11

La. Code of Civil Procedure, Article 591C 26

La. Code of Civil Procedure, Article 593.1 12

La. Code of Civil Procedure, Article 594 27

F.R.C.P. Rule 23 ..... 1, 14, 25

La. R.S. 9:2798.1 ..... 3, 18, 19, 23, 25

La. R.S. 33:3811 24

La. R.S. 33:3837 24

La. R.S. 33:4161 et seq. **25**

CASES:

Amchem Products, Inc. vs. Windsor, ***529 U.S. 591, 117 S. Ct. 2231, 2245 (1997)*** **1, 26**

Attaya v. Town of Gonzales, 192 So. 2d 188 (La. App. 1 Cir. 1966) **24**

Banks v. New York Life Insurance Co., 98-0551 (La. 7/2/99), 737 So. 2d 1275 ..... **2**

Barrett v. T. L. James & Co., 671 So. 2d 1186 (La. App. 2 Cir. 1996) writ denied 674 So. 2d 973 (La. 1996) **22**

Bartlett v. Browning Ferris Indus. Chem. Services, Inc.,683 So.2d 1319 (La. App. 3 Cir. 1996); overruled on other grounds 99-0494 (La. 11/12/99) 759 So.2d 755.. ..... **22**

Begnaud v. Camel Contractors, Inc., 721 So. 2d 550 (La. App. 3 Cir. 1998) **23**

Berkovitz v. Chambers, 486 U. S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988) **24**

Bernard v. Thigpen Construction Company, et al, 97-1877 (La. 11/21/97) 702 So.2d 1387 ..... **25**

Bogan v. Scott-Harris, 118 S.Ct. 966, 523 U.S. 44 (1998) **1, 14, 16, 20**

Boguille v. Chambers, 685 So. 2d 582 (La. App. 4 Cir. 12/11/96) **24**

Castano v. American Tobacco Co., 84 F. 3d 734, 746 (5 Cir. 1996) **27**

Dalehite v. United States, 346 U.S. 15, (1953) .. 16, 17, 18, 20

Doerr v. Mobil Oil Corporation, 01-0775 (La. App. 4 Cir. 2/27/02) 2002 WL 334679 26

Duhe v. Texaco, Inc., 99-2002 99-2002 (La. App. 3 Cir. 2/7/01), 779 So.2d 1070 25

Feldheim v. Si-Sifth Corp., 715 So. 2d 168 (La. App. 5 Cir. 1998) 21

Ford v. Murphy Oil USA, Inc., 96-2913 (La. 9/9/97), 703 So.2d 542 ..... 2, 26

Graf v. Town of St. Gabriel, 744 So. 2d 1 (La. App. 1 Cir. 1998) 20

Hampton v. Illinois Central Railroad, 98-0430 (La. App. 1 Cir. 4/1/99), 730 So.2d 1091 ..... 26, 27

Hardy v. Bowie, 744 So.2d 606, 613 (La. 1999) 24

McCastle v. Rollins Environmental Services of Louisiana, Inc., 456 So.2d 612 (La. 1984) 26, 27, 28

Michael v. City of Minden, 704 So. 2d 409 (La. App. 2 Cir. 1997) 24

Miller v. Mackey International, Inc. 452 F.2d 424, 427 (5th Cir. 1971) 26

Ortiz v. Fibreboard Corporation, 119 S.Ct. 2295, 527 U.S. 815, 144 L.Ed.2d 715 (1999) 1, 26

Simeon v. Doe 618 So. 2d 848 (La. 1993) 24

State ex rel. Guste vs. General Motors Corp., 370 So.2d 477(La. 1978) 2

Stevens vs. Board of Trustees, 309 So.2d 144 (La. 1975) 2, 20, 21

Stewart v. City of Pineville, 511 So.2d 26 (La. App. 3 Cir. 1987) 22

Tenney v. Brandhove, 341 U.S. 367, 377 (1951) 16

United States v. Muniz, 374 U. S. 150,163 (1963) 18

United States v. Varig Airlines, 467 U.S.797 (1984) 1,14, 18, 19, 20

Ursin v. New Orleans Aviation Board, 506 So. 2d 947 (La. App. 5 Cir. 1987) 21

Welcker v. Fairgrounds Corp, 577 So. 2d 301 (La. App. 4 Cir. 1991) 21

Williams vs. State, 350 So.2d 131 (La. 1977) 2

STATEMENT OF JURISDICTION

United States Supreme Court Rule 10 provides that jurisdiction is proper in this case because a state court of last resort has decided an important issue which conflicts with this Court's earlier rulings concerning the doctrine of Discretionary Act Immunity in ***Bogan v. Scott-Harris***.[1] This Honorable Court also has jurisdiction over this case because the Louisiana Supreme Court's denial of a writ of certiorari implicitly refused to consider this Court's decision upholding Discretionary Act Immunity for alleged negligent acts committed by the employees of a governmental entity (the Federal Aviation Administration) in ***United States v. Varig Airlines***.[2]

The Louisiana Supreme Court has allowed class certification in this case where the named plaintiff, proposed class representatives, and potential class members would only recover damages based on nuisance, aggravation, and annoyance, without providing supporting documentation of any other damages, contrary to Louisiana substantive law. This Honorable Court has recently reversed the grant of class certification in ***Amchem Products v. Windsor*** and ***Ortiz v. Fibreboard Corporation***, when plaintiffs failed to prove that the requirements of **Federal Rule of Civil Procedure, Article 23(b)(1)(B)** "limited fund" certification had been met.[3] While this case was certified under Louisiana procedural law, the 1997 amendments to the **Louisiana Code of Civil Procedure** articles concerning class certification are virtually identical to **Federal Rules of Civil Procedure, Article 23**. In cases decided before the 1997 Amendments, Louisiana Courts have repeatedly directed lower Courts to look to **Rule 23** and its interpretative jurisprudence for guidance, particularly concerning the predominance and superiority analysis now made statutory,

---

[1] ***Bogan v. Scott-Harris, 118 S.Ct. 966, 523 U.S. 44 (1998)***

[2] ***United States v. Varig Airlines, 467 U.S. 797 (1984)***

[3] ***Amchem Products v. Windsor, 521 U.S. 591, 117 S.Ct.2231, 138 L.Ed.2d 689 (1997); Ortiz v. Fibreboard Corporation, 119 S.Ct. 2295, 527 U.S. 815, 144 L.Ed.2d 715 (1999).***

before exercising their discretion to certify a class.[4]

This writ application is for review of a District Court Judgment, affirmed by the Louisiana Third Circuit Court of Appeal, and subsequent denial of the Town's writ application by the Louisiana Supreme Court, which certifies a potential class of 4,000 persons who allegedly seek to recover emotional damages, unaccompanied by any physical injury or illness, from three separate defendants under different factual and legal theories of recovery, some of which are novel, untested and subject to prescription.[5] The certification of the class in this case represents an expansion into a whole new area of "mass tort" litigation, involving purely emotional damages unaccompanied by any physical injury.

The danger of opportunistic and manufactured claims is even more pronounced in cases like the one at bar, involving claims for pure emotional injury, without medical treatment, and in any other case in which large groups of people, who have sustained no physical injury, but may have witnessed an event, such as a neighborhood fire or a plant explosion miles away, file class actions for emotional distress, anxiety, aggravation, or inconvenience. As a procedural device, the class action is not supposed to give substance to claims that have none, or apply to claims involving issues of causation and injury-in-fact that can only be resolved on an individual basis. If the policy limiting causes of action for purely emotional damages is to discourage the litigation of spurious claims, then that policy is not advanced by the certification of a class of persons on the basis of a Petition filed by one or two disgruntled persons purporting to assert emotional damages for the group. The dangers of magnified claims, skewed

---

[4] ***State ex rel. Guste vs. General Motors Corp.*, 370 So.2d 477 (La. 1978)(on rehearing); *Williams v. State*, 350 So.2d 131 (La. 1977); *Stevens vs. Board of Trustees*, 309 So.2d 144 (La. 1975); *Ford v. Murphy Oil, U.S.A., Inc.*, 96-2913 (La. 9/9/97), 703 So.2d 542; *Banks v. New York Life Insurance Co.*, 98-0551 (La. 7/2/99), 737 So.2d 1275.**

[5] Two of the five purported class representatives also seek recovery of losses to their businesses and damages to personal water filtration devices used in their businesses.

trial outcomes, and unfair settlement for fear of "all-or-nothing" verdicts militate against certification.

Additionally, a policy consideration of Discretionary Act Immunity for similarly situated towns must be seriously considered by this Honorable Court, since the Louisiana Supreme Court, the Louisiana Third Circuit Court of Appeal, and the Trial Court gave no consideration to this doctrine and its application to class certification.

The Town of Ferriday asks that this Application be granted, and for full briefing and argument, to determine whether the Town is entitled to Discretionary Act Immunity, and whether a class should be certified consisting of persons claiming emotional damages without any physical injury.

RELEVANT STATUTORY PROVISIONS

La. R.S. 9:2798.1 states:

> Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policy making or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

Louisiana Code of Civil Procedure, Article 591 provides as follows:

> A. One or more members of a class may sue or be sued as representative parties on behalf of all, only if:
>
> (1) The class is so numerous that joinder of all members is impracticable;
>
> (2) There are questions of law or fact common to the class.
>
> (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class.
>
> (4) The representative parties will fairly and adequately protect the interests of the class.

(5) The class is or may be defined objectively in terms of ascertainable criteria, such that the court may determine the constituency of the class for purposes of the conclusiveness of any judgment that may be rendered in the case.

B. An action may be maintained as a class action only if all of the prerequisites of Paragraph A of this Article are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these findings include:

(a) The interest of the members of the class in individually controlling the prosecution or defense of separate actions;

(b) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) The desirability or undesirability of concentrating the litigation in the particular forum;

(d) The difficulties likely to be encountered in the management of a class action;

(e) The practical ability of individual class members to pursue their claims without class certification;

(f) The extent to which the relief plausibly demanded on behalf of or against the class, including the vindication of such public policies or legal rights as may be implicated, justifies the costs and burdens of class litigation; or

(4) The parties to a settlement request certification under Subparagraph B(3) for purposes of settlement, even though the requirements of Subparagraph B(3) might not otherwise be met.

C. Certification shall not be for the purpose of adjudicating claims or defenses dependent for their resolution on proof individual to a member of the class. However, following certification, the court shall retain jurisdiction over claims or defenses dependent for their resolution on proof individual to a member of the class.

STATEMENT OF THE CASE

1) Allegations of the Lone Plaintiff

This case involves a lawsuit filed in October of 1999, by Gloria B. Martello, the owner of Brocato's Restaurant in Ferriday, Louisiana, against the Town of Ferriday, Owen & White Engineering, and later US Filter Wastewater Group. Her original Petition asserted four separate causes of action, including strict

liability, breach of contract, negligence and redhibition, predicated on the engineering firms' alleged fault in designing, maintaining and operating the Town's new water plant, and the Town's alleged negligent operation of that same plant. The claim against US Filter Wastewater Group, the successor corporation of Neptune Microfloc, was predicated on the improper design, and alleged negligently conducted pilot plant water content study performed in 1983, which indicated that the Adsorption Clarifier System in the Neptune Plant was capable of removing Manganese from Marengo Bend, the source of the Town's water. The plant came online in late 1988, and the first Manganese problems surfaced in April of 1989.

Mrs. Martello seeks recovery of damages for alleged "severe mental and emotional distress", fear of disease, inconvenience, annoyance and discomfort, along with unspecified business and property losses sustained. Mrs. Martello also sought damages for the three day disruption of water service caused by the shut down of the plant and an issuance of a boil water notice by the State Department of Health and Hospitals in August, 1999. The Boil Notice was lifted in December, 1999. Mrs. Martello's Petition also sought class certification under the **Louisiana Code of Civil Procedure, Article 591**. Mrs. Martello alleged twenty-four separately numbered allegations of common issues of law and fact, all pertaining to the defendants' alleged legal liability. The Petition also advanced the right to pursue remedies under two contracts between the Town and Owen and White under the Louisiana Civil Law *stipulation pour autrui* (third party beneficiary) doctrine.

Prior to its filing of an Answer, the Town of Ferriday asserted an Exception of No Right of Action, which was orally amended by agreement of all counsel at the class certification hearing to an Exception of No Cause of Action. The Town also filed a Dilatory Exception of Vagueness which was never waived or set for hearing by the Trial Court.

(2) The Certification Hearing

Mrs. Martello sought to have the class certified under **Louisiana Code of Civil Procedure, Article 591(B)(1)(b)**, known

as the "limited fund" class certification theory. In March, 2001, approximately six days before the Certification Hearing, Martello attempted to amend her Petition a third time to include Shelby Guidry, Mildred McKinney, Christine Murray Roberts, and Tommie Massey as additional petitioners,[6] but Leave to Amend was not granted before the Certification Hearing.

In depositions taken prior to the amendment as part of the pre-certification discovery, McKinney, Roberts, and Massey testified that by joining suit they were not seeking compensation for themselves and wanted only clean water from the plant.[7] The depositions of these class members were proffered at the class certification. Mrs. Roberts testified in deposition:

> Well, I have to admit I never thought that we were gonna get any money out of this. I just wanted to prove a point that we really need to do something about the water....I do like Ferriday. I know people that live there, and I just, you know, wanted to stand up and at least tell what I had to go through in hopes that it would help to get things changed for the better.

Mrs. Roberts moved with her family to Natchez, Mississippi in late August, 1999, a few days after the Boil Order was instituted. Mrs. Roberts' testimony at Trial was representative of the late- added putative class representatives toward personal

---

[6]Neither the Third Supplemental and Amending Petition nor Order granting leave to file it appear in the record. Petitioners attempted to file the Petition about six days prior to the certification hearing, when all defendants objected. Petitioners withdrew the Amending Petition, and the Hearing to allow the Amending Petition was set for August 15, 2001, but was continued by plaintiffs without date. As of this date a hearing requesting leave of court to file a superceding and amending petition was heard on August 20, 2002, and the Trial Court took this Motion under advisement.

[7]The pre-class certification depositions appear in the record as a proffer.

compensation as follows:

> Q. And isn't it fair to say that you never thought that you'd get any money out of this, you just wanted to prove a point that they, the City, really needed to do something about the water?
>
> A. Yes, I did say that.

Massey does not live in Ferriday, but is an Administrator of a Nursing Home in Ferriday and owned by a company in Atlanta, Georgia. Massey testified in deposition that he was seeking reimbursement of losses sustained only by his corporate employer.[8] The nursing home corporation, however, is not a party to this action.

At the certification Hearing conducted April 30 through May 4, 2001, McKinney, Roberts, and Massey all changed their testimony and claimed that they were seeking personal compensation for their individual stress, aggravation, and inconvenience suffered during the time the Boil Water Notice was in effect.

Guidry and Martello, neither of whom used the Town's water at their home for drinking or cooking, are the only claimants seeking to recover business losses and property damage for themselves.[9] Guidry's claim is for lost laundry business during the shutdown and for expenses and reimbursement of the price of a filter system she had installed in her laundraumat in 1996, three years before the boil advisory, to filter out Manganese. Mrs. Guidry stated that her water filter system was constantly having to

---

[8]"I don't have anything other than expenses." US Filter Proffer #3, p. 6.

[9]Martello moved back to Ferriday in 1986, but used only bottled water for personal consumption. Guidry does not use the Town's water in her home, since she does not live in the Town of Ferriday, but only uses the Town's water at her laundromat located within the city limits.

be cleaned and "regenerated" during and after the Boil Water Notice.

None of the petitioners claimed or proved that they suffered any physical injuries or illnesses from consuming or bathing in the water, and no evidence was submitted at the certification hearing that any purported class member had sustained any physical injury or illness as a result of the Boil Notice. None of the class representatives testified that they feared illness or disease, or sought medical or psychological counseling. All but Massey testified that they intended to pursue this action even if it were not certified as a class.

Other witnesses called by the plaintiff established that the Town of Ferriday hired Owen and White Engineers in 1978 to undertake improvements and extensions of their municipal water system and to investigate the possibility of using an additional or alternative water source. The existing plant drew ground water from the Mississippi River alluvial sands, but was in poor condition. Owen & White investigated a number of alternative water sources, but eventually settled on Marengo Bend known at the time to contain high levels of iron and Manganese as a surface water source. A pipeline system was erected to connect the plant to the water intake structure on Marengo Bend. Owen & White recommended that a design for the intake structure that was conscious of certain hyper-inflated construction costs which were prevalent between 1982 and 1984. The Town of Ferriday also had lost revenue sharing in the first part of the 1980's, so an adsorption clarifier system was utilized rather than the existing settling pond and/or tube settling technology, which was more expensive at the time. This savings was approximately $170,000.00 in construction costs, and Owen & White recommended a pilot plant water study, which was conducted on or about May 20, 1983, at the intake structure. Owen & White then determined that the Neptune Plant was suitable for the job and recommended that the Town buy the Plant at the lower cost. The Plant was built and ultimately commenced operation in December 1988.

In Spring of 1989, complaints began surfacing about the staining of laundry in Ferriday, which Owen & White determined to be caused by high levels of Manganese in the water. These high levels of Manganese typically occurred when the water levels were

lower during the dryer summer months, and recurred periodically every year until the Summer of 1999.

The presence of Manganese is a secondary water concern to the Louisiana Department of Health and Hospitals, and does not pose a threat of bodily injury to anyone consuming that water. Manganese does have something of an odor and reacts adversely with laundry bleach, which discolors and stains clothes.

In 1989, Owen & White recommended several solutions, including a floating intake structure which was never approved by either the Town or the U.S. Army Corp of Engineers. Owen & White did design and install a culvert system which forced water to be drawn through the valve from a higher level where the levels of Manganese in the water were lower.

The Town's financial problems continued to affect the operation of the plant, and ultimately a $1.1 million dollar grant was obtained from the U.S. Department of Agriculture to either install a floating intake structure, or a detention and oxidation tank. To date, neither alternative has been implemented.

In August, 1999, during an inspection of the Town's Plant, Michael Cazes of the Louisiana Department of Health and Hospital, Office of Public Health, found rising turbidity levels (particulate matter in the water) in excess of Federal and State levels. Mr. Cazes suspended the inspection to give the Town time to correct the problem, and when it couldn't, he issued a Boil Water Advisory. The Advisory was a request that the Town notify all water customers to boil their water before drinking or cooking with it, and when Mr. Caze later learned that a local school had not received notice, a Boil Water Notice was issued on August 24, 1999. Mr. Caze testified that the State's issuance of the Boil Notice did not mean that the Town's water was not drinkable, only that the Town's water quality (clarity) was questionable.

At that same time, the Plant shut down due to the accumulation of sludge in the Cleanwater Holding Tank. The sludge clogged up the clean water filter and drained the tank of needed fresh water to backwash and clean the filter. The sludge was removed in three days, and the turbidity levels were brought under control within a few days after the holding tank had been cleaned and water service restored. Ninety-eight percent (98%) of the water samples tested in October, and all of the samples tested

in November were within the State and Federal guidelines.

The State Department of Health and Hospitals did not lift the Boil Notice until December-1999, after the Town made repairs to the Plant. The Plant has been producing quality water ever since, and free water was made available by the Town of Ferriday to all its water customers and residents at schools and businesses during the period of the Boil Notice.

(3) The Judgment

After the Class Certification Hearing was held, the Trial Court issued a Judgment, along with Written Reasons for that Judgment on July 25, 2001. ***(App. "A")*** The Trial Court's Reasons for Judgment were a verbatim copy of the Proposed Findings of Fact and Conclusions of Law submitted by plaintiff's attorneys. ***(App. "B")*** Abandoning the theory of the Limited Fund under **Louisiana Code of Civil Procedure, Article 591(B)(1)(b),** originally pled by the plaintiff, the Court concluded that the plaintiffs had satisfied all of the statutory requirements of **Louisiana Code of Civil Procedure, Article 591(A)(1)-(4)** concerning numerosity, commonality, typicality, and adequacy of representation. Also, the Court held that the common issues of law and fact predominated over individual issues, and that a class action was superior to all other available methods of adjudication required under **Article 591(B)(3).** The Trial Court had previously excluded defendant's expert on class certification, who was prepared to testify that common issues of law and fact did **not** predominate over individual issues, and that one consolidated lawsuit was superior to the class certification. This exclusion was solely based on the plaintiff's attorneys' representation that they were proceeding under the Limited Fund Theory of **Louisiana Code of Civil Procedure, Article 591(B)(1)(b).**

The Trial Court specifically acknowledged in Written Reasons that not one of the purported class members suffered any physical injury, illness, or disease. The Trial Court incorrectly concluded that the common issues of liability and fault predominated because the "claims for damages differ only by degree or amount, but they are all of the same common types and categories, predominantly being claims of inconvenience,

annoyance, and discomfort; mental and emotional distress and stress; non-reimbursed personal expenses; and also non-reimbursed business expenses." The Trial Court further concluded that the class action was a superior device, without giving any consideration to alternative procedures such as joinder or consolidation, because of the Court's presumed authority to order separate Jury Trials of liability issues without the party's consent, as would otherwise be required under **Louisiana Code of Civil Procedure, Articles 1562 and 1736**. The District Court failed to note that the statutory authority for ordering separate Jury Trials under **Article 593.1** had been repealed in 1997. The District Court adopted the following class definition:

> All persons, businesses, or entities who belong to at least one of the following five groups, and who, as a direct result of receiving the water from the Town...Water Plant between August 20, 1999 and December 22, 1999, have at least one of the following claims: Mental and emotional distress; non-reimbursed personal expenses; non-reimbursed business expenses; loss of personal income; loss of business income, annoyance, discomfort, and inconvenience; personal injury including fear of contraction of disease or illness; or property damage.
>
> 1) Residents [who received water at their residence from the Town];
>
> 2) Owners and/or operators of businesses [that receive their water at their business];
>
> 3) Lessors [that receive their water at their lease property];
>
> 4) Employees of business [that receive their water at their place of employment]; and
>
> 5) School students and patients in healthcare facilities [who receive their water at school or the facility].

(4) Post Certification Amendments to the Petition and Recusal

On July 27, 2001, after the entry of the Certification Judgment, Mrs. Martello moved for Leave to file a Superseding and Consolidated Amended Petition listing Roberts, McKinney, Massey, and Guidry as petitioners, and adding fifteen additional itemized allegations of common issues of law and fact. The Order for Leave to file this Amendment has not yet been signed.

The Consolidating Amended Petition adds new claims of fraud against three additional defendants, Eugene Owen, Roy Waggenspack, and Peter Hollis, all employees of Owen & White Engineers. Plaintiffs alleged that they were unaware of the alleged fraudulent conduct of Owen & White and the newly added defendants until the individual defendants' depositions were taken in July, 2000, as part of the pre-class certification discovery.[10] They alleged that this newly discovered fraud was a "cause-in-fact of the damages the petitioners and class members have suffered and continue to suffer" in the case.

Less than two weeks after signing the plaintiffs' verbatim Reasons for Judgment, on August 6, 2001, Judge Kathy Johnson, who presided over the certification hearing and issued the certification Judgment, and Judge Leo Boothe, the other sitting Judge in the 7th JDC, both recused themselves from the case on their own Motion. The Louisiana Supreme Court subsequently appointed Judge Charles R. Brackin to preside over the case. All defendants filed Suspensive Appeals challenging the certification of the suit as a class action, and the Louisiana Third Circuit Court of Appeal affirmed the Judgment, citing the manifest error standard

---

[10]The Certification Hearing was conducted ten (10) months after these depositions were taken. Certainly additional issues of fraud would not be common, and whether the named plaintiffs or class representatives would have any action for fraud is yet another issue.

of review but undertaking no analysis of the appropriateness of the class action in effectuating substantive law or of the individual proof necessary for each claimant to establish a claim. ***(App. "C")*** The Town of Ferriday applied for a Rehearing, on the basis that the Third Circuit stated that there was never an Exception of No Cause and/or No Right of Action placed before it for decision. The Request for Rehearing was denied on May 1, 2002. ***(App. "D")*** Application for Supervisory Writs was made to the Louisiana Supreme Court by all defendants, and that Court denied writs on June 7, 2002. ***(App. "E")***

SUMMARY OF ARGUMENT

The Town of Ferriday's providing water to citizens is clearly a discretionary function, and actions taken by Town employees to provide such water should be protected from liability by Discretionary Act Immunity. This Court has held that, although impossible to define with precision every contour of the discretionary function exception, the nature of the conduct and the goal of preventing judicial "second guessing" of legislative and administrative decisions grounded in social, economic and political policy through the medium of a tort action, should be protected with immunity.[11] This Court recently held that individual legislators are individually immune from liability for their legislative acts.[12] Clearly, the Town of Ferriday should be dismissed from this class action suit because the actions taken by their employees in providing water to their citizens are rooted in social, economic and political policy, protected by Discretionary Act Immunity.

This case is not appropriate for class certification under the 1997 amendments to **Louisiana Code of Civil Procedure, Article 591**, which make it nearly identical to **Federal Rule of Civil Procedure, Article 23**. The large number of purportedly aggrieved class members consists of persons whose only alleged injuries are emotional damages associated with inconvenience and annoyance,

---

[11] ***United States v. Varig Airlines, 467 U.S. 797 (1984).***

[12] ***Bogan v. Scott-Harris, 118 S.Ct. 966, 523 U.S. 44 (1998).***

unaccompanied by any physical injury or illness whatsoever. Under Louisiana Law, compensable damages for emotional distress, unaccompanied by physical injury or illness, is necessarily dependant upon **individual proof** surrounding the circumstances and severity of the alleged distress. As a matter of substantive policy and law, to guarantee that the claim is not spurious, there must be proof of an especial likelihood of genuine and serious mental distress that can only be determined on an individual basis. Such individual claims are not maintainable as a class action in light of the prohibition in **Article 591(C)** that "Certification should not be for the purpose of adjudicating claims or defenses dependant for their resolution upon proof individual to a member of the class."

The evidence submitted at the certification hearing failed to establish that common issues of fact and law predominate over the issues affecting individual members or that the class action was superior to other methods of adjudicating the controversy, particularly Louisiana's Procedure for Joinder and Consolidation. The evidence did not establish a sufficient number of truly aggrieved persons that would make joinder or consolidation impracticable, or that the compensable claims asserted by the five putative class members were typical of other claims for damages sustained by the class members, other than purely emotional damages unaccompanied by physical injury.

De-certification should also be made on policy grounds. The danger of magnified and opportunistic claims of potential class members who have no injuries also weigh in favor of de-certification. All of the purported class members testified that they are willing to pursue their claims on an individual basis, even if this case is not certified. Those claims are better resolved or settled under Louisiana's liberal Joinder Rules concerning consolidation or accumulation of actions. Those procedural devices better serve the policies underlying the substantive law and insure fairness to all parties, so that defendants are not subjected to unfair settlements, all or nothing verdicts, or skewed trial outcomes involving meritless claims.

ARGUMENT

(1) The discretionary policymaking decisions implicating budgetary priorities of a Town to provide services to its citizens is protected by Discretionary Act Immunity.

This Honorable Court has held that local legislative officials are entitled to absolute immunity from suit for their actions taken when performing legislative functions.[13] This Honorable Court specifically stated that the enactment of an ordinance, which reflected the discretionary, policymaking decisions implicating the budgetary priorities of the city and the services it provides to its constituents, protected the local legislators from tort suit with immunity.[14] This Honorable Court further held that the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability.[15] The time and energy required to defend against a lawsuit are of particular concern at the local level, where part time citizen-legislators remain commonplace, and the threat of liability may significantly deter service in local government.[16] The principle of absolute immunity for legislators is not new, but has its roots in the English Parliament's struggles of the 16th and 17th Centuries.[17] Thus, in the ***Bogan*** case local elected officials' actions of eliminating from their budget the department where an employee who had been reported as cursing members of the general public were found to be protected by immunity from a civil rights suit brought by the employee.

This Honorable Court held that government discretion does not end upon the initiation of programs and activities, but includes determinations made by executives and administrators in establishing plans, specifications or schedules of operations.[18] This Honorable Court further held that the acts of subordinates in carrying out the operations of government in accordance with

---

[13] ***Bogan v. Scott-Harris, 118 S.Ct.966, 523 U.S. 44 (1998)***

[14] ***Id at p. 49***

[15] ***Id at p. 50***

[16] ***Id at p. 50 citing Tenney v. Brandhove, 341 U.S. 36, 37 (1951)***

[17] See ***Tenney supra; & Bogan. at p. 48.***

[18] ***Dalehite v. United States, 346 U.S. 15, 35-36 (1953)***

official directions cannot be actionable.[19] In the ***Dalehite*** case, the United States government cabinet-level decision to institute a fertilizer export program to war ravaged Europe was never seriously disputed. However, the need for further testing of the explosive properties of the fertilizer, (considering the explosion that leveled Texas City, Texas, in 1947), was the subject of a negligence suit instituted by some 300 plaintiffs asserting personal and property damage claims under the Federal Tort Claims Act as a result of the explosion. This Honorable Court held that the four specific acts of negligence found actionable by the trial court in ***Dalehite*** did not subject the United States Government to liability because they were all responsibly made at a planning, rather than an operational, level.[20]

An analogy is easily made to the case at bar considering the choice of the Town of Ferriday in its purchase of the current water plant. Choices such as the type of plant to purchase, considering meager resources in the 1970's and early 1980's; the rising cost of construction which made the Town consider the adsorption clarifier system rather than conventional tube settlers or sedimentation pond; the placement of a water intake structure nearly one mile away from the plant when the Town could not afford to purchase the land immediately behind the plant; the placement of chemical feed equipment near the adsorption clarifier, rather than at the source of water intake; the rate of feed and choice of chemicals and "floccing" agents to remove the manganese from the water; the maintenance schedules for repair of the adsorption clarifier, the clean water holding tank, and backwashing the water filters all involve the exercise of discretion by the Town. The Town of Ferriday should be provided immunity protection from suit based on discretionary choices made due to monetary constraints imposed on the Town. Further, the Town could only afford to hire a certain number of water plant operators, and by the time that these operators obtained certification from the State, the operators would find better paying jobs. Clearly, discretionary acts performed by the Town of Ferriday in operating their water plant

---

[19] ***Id at p. 36.***

[20] ***Id at p. 42.***

should protect them from tort suit herein.

This Honorable Court further extended immunity to employees of the Federal Aviation Administration when their aircraft design inspection procedures failed to detect a violation of applicable safety standards in the Boeing 707 trash receptacle, which resulted in a fire that killed most passengers aboard a flight from Rio de Janeiro to Paris.[21] Finding that the FAA had limited resources to conduct the inspections necessary to comply with the elaborate compliance review process, this Court stated that the parameters of discretionary immunity were impossible to define.[22] Certain factors must be considered when determining whether the actions of a government employee are protected from liability based on Discretionary Act Immunity, including 1) the nature of the conduct rather than the status of the actor, and 2) the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.[23]

This Court reasoned that Congress wished to prevent judicial "second guessing" of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort.[24] By fashioning an exception for discretionary governmental functions, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations."[25] The Town of Ferriday is entitled to the Discretionary Act Immunity of **La. R.S. 9:2798.1** because the providing of water to its citizens is a discretionary act, for their health, safety and general welfare, as testified to by former Ferriday Mayor Montgomery. Mayor Montgomery testified that the Town had the sole discretion to place its funds where necessary to run the Town and provide services to its citizens.

---

[21] ***United States v. Varig Airlines, 467 U.S. 797 (1984)***

[22] ***Id at p. 813 citing Dalehite v. United States,346 U.S. 15, 33 (1953)***

[23] ***Id at p. 813.***

[24] ***Id at p. 814.***

[25] ***Id at p. 814*** **citing** ***United States v. Muniz, 374 U.S. 150, 163 (1963).***

Mayor Montgomery testified that the note payable on the water plant and chemical costs related to running the water plant were the single largest expenditures the Town made, and the Town had to apply for grants, raise water consumption bills, and raise taxes to keep the water plant running.[26]

Every witness who testified at the class certification hearing agreed that the Town considered the cost of the water plant in its initial construction, monthly chemical costs, maintenance, operation, and hiring of operators, to be a crucial factor in providing water to its residents.[27] In essence, the Town did what it could do with limited resources to provide its citizens with the best water available. Engineers, chemists, water operators, and chemical salesmen could not figure out how the Town water plant could remove the manganese. The Town of Ferriday, with 4,500 residents, simply could not afford the $200,000.00 annual chemical cost bill and the $240,000.00 annual note payable to the Farmers Home Administration for the water plant. The decision to allocate scarce Town resources to the water plant was purely discretionary, by definition, and the Town should therefore be entitled to Discretionary Act Immunity pursuant to **La. R.S. 9:2798.1.** The source of the Town's Exception of No Cause and/or No Right of Action was based on Discretionary Act Immunity.

This Honorable Court refused to "second guess" the political, social and economic judgments of an agency exercising its regulatory function in the ***Varig Airlines*** case, considering the FAA's goal of accommodating air transportation safety and the reality of finite agency resources.[28] Considering the Town of Ferriday's minimal resources, where the chemical costs and note payments for its water plant are the largest expenditures the Town makes in its entire budget, such decisions should be protected by Discretionary Act Immunity. Thus, the Trial Court erred denying the Town's Exception of No Cause/No Right of Action, and

---

[26]**See Record p. 1489-1491, 1501-1502.**

[27]**See Record (p. 1457, 1489-1491, 1501-1502, 1565-1566, 1626-1627, 1646-1666, 1647, 1477, & 1833).**

[28]***U.S. v. Varig Airlines, 467 U.S. 797, 820 (1984)***

considering this Court's pronouncements in the ***Bogan***, ***Dalehite***, and ***Varig Airlines*** decisions, this writ application should be granted, and Mrs. Martello's suit should be dismissed.

(a) The Town of Ferriday's argument that it is entitled to Discretionary Act Immunity was never fully considered by any court in this matter.

The Trial Court only spent one paragraph in its 24 page "Reasons for Judgment" addressing the Town's Exception of No Right of Action, conformed by agreement of the parties at the beginning of the class certification hearing to an Exception of No Cause of Action, as follows:

> Since the Court finds that the plaintiff has met and satisfied all of the Article 591(A) Requirements for Certification, and has met and satisfied the Article 591(B)(3) Requirement for Certification as to all three defendants, the Court finds that the Town of Ferriday has failed to meet the burden of proof on its Exception of No Cause of Action. The Town of Ferriday's Exception of No Cause of Action, therefore, is hereby **OVERRULED** for all the same reasons for Judgment assigned herein. ***(See App. "B").***

This statement in the Trial Court's Written Reasons for Judgment that the plaintiff met all of the requirements for class certification, and that the Town had failed to meet their burden of supporting their Exception, is *per se* grounds to overturn the Trial Court's Judgment. The Louisiana First Circuit Court of Appeal's decision in ***Graf v. Town of St. Gabriel***, required that the Trial Court first consider the Exception of No Right of Action before considering and/or ruling on the class certification issue.[29]

In Louisiana, an Exception of No Cause of Action is the

---

[29] ***Graf v. Town of St. Gabriel, 744 So.2d 1 (La.App. 1Cir. 1998)***

proper procedural vehicle to challenge the use of a class action procedure, and it "need not be heard on the pleadings alone".[30] The Louisiana Supreme Court has upheld the ability of parties to put on evidence in support of or in opposition to class certification through the procedural device of an Exception of No Cause of Action.[31] In the case at bar, no evidence presented by the plaintiff supported their theory that inconvenience and nuisance alone were compensable. In fact, Louisiana law does not allow a suit for nuisance alone to proceed, unless accompanied by severe emotional distress, individual to the claimant, and well documented with appropriate medical history.

In ***Ursin v. New Orleans Aviation Board***[32] the Trial Court granted an Exception of No Cause of Action refusing to certify a class action, but allowed the case to proceed through individual suits brought by property owners adjacent to the New Orleans International Airport. The suit involved complaints of excessive noise and inconvenience associated with the residents living near the airport in the aircraft flight path.

Additionally, a damage award to a property owner adjacent to the New Orleans Fairgrounds Racetrack was overturned by the Louisiana Fourth Circuit of Appeal when the only real damage a landowner had suffered was "mere inconvenience" without economic harm.[33] The Court held that damage to the "ambiance" of the building by the fairground lights was no more than "inconvenience" defined by **Louisiana Civil Code, Articles 667 & 668**, and not compensable. The owner of the property never attempted to market the property, had no intention of selling it, did not show it as a historical attraction, and steadily increased the rent to his tenants over the years that the damage allegedly occurred.

An award of $1,000.00 in damages was upheld by the

---

[30] ***Feldheim v. Si-Sifh Corp., 715 So.2d 168 (La. App. 5 Cir. 1998) citing Stevens v. The Board of Trustees, 309 So.2d 144, 152 (La. 1975); Ursin v. New Orleans Aviation Board, 506 So.2d 947 (La. App. 5 Cir. 1987).***

[31] ***Stevens, Supra.***

[32] ***506 So.2d 947 (La.App. 5Cir. 1987).***

[33] ***Welcker v. Fairgrounds Corp., 577 So.2d 301 (La. App. 4Cir. 1991).***

Louisiana Third Circuit Court of Appeal based on noise and inconvenience suffered by the plaintiff during construction of a water pumping station adjacent to the plaintiff's home.[34] Although the Louisiana Third Circuit found the noise a nuisance, there was no evidence of depreciation of property values, no damage to vehicles from sandblasting, and the natural servitude of drain was not made more burdensome by the City's action.

All the putative plaintiffs who have testified in this case, including Mrs. Martello, are attempting to make claims for damages based on nuisance, inconvenience, and minor business expense associated with the boil order, such inconvenience is usually not enough to award damages against the alleged offending party.[35] In ***Barrett***, a plaintiff's claims for mental anguish, respiratory disease, inconvenience, and diminution of property value due to a nearby plant construction were rejected.

The Third Circuit Court of Appeal upheld the jury verdict which rejected plaintiff's claims that alleged noxious fumes from a nearby hazardous waste site caused his damages.[36] In the ***Bartlett*** case, one of the plaintiffs testified that smells from the adjacent hazardous waste facility disturbed his sleep, burned his eyes, and occasionally made him dizzy. The large trucks passing in front of his house would track mud and clay on his road, and on one particular occasion the smell was so bad that it "knocked him to his knees". Despite this compelling testimony, and much like Mrs. Martello and the purported class representatives in this case, the plaintiff never sought medical treatment for alleged medical problems associated with the smells. No complaints of residual effects after the odor problem disappeared were made by the residents, and the Jury found no damages.

The Third Circuit Court of Appeal has held that the

---

[34] ***Stewart v. City of Pineville, 511 So.2d 26 (La. App. 3Cir. 1987).***

[35] ***Barrett v. T.L. James & Co., 671 So.2d 1186 (La. App. 2Cir. 1996) Writ denied 674 So.2d 973 (La. 1996).***

[36] ***Bartlett v. Browning-Ferris Industries, Chemical Services, Inc., 683 So.2d 1319 (La. App. 3Cir. 1996) overruled on other grounds 759 So.2d 755 (La. 11/12/99).***

defendant/owners of excavation pits were not liable to the plaintiffs for mental anguish suffered strictly as a result of property damage.[37] The Court upheld the property damage award related to excessive noise, fumes, and dirt caused by the defendant's business, but rejected plaintiff's claims for damages related to mental anguish suffered in conjunction with the property damage.

The Claims asserted in this case are solely for mental anguish, nuisance, and inconvenience. These types of claims have consistently been rejected when they were made without any associated physical damages.

The Town of Ferriday's Exception of No Cause/No Right of Action cuts right to the heart of this case in the sense that plaintiffs' claims for nuisance alone are not supportable when they are not accompanied by physical damage to either their persons or their property. The Town did not place a Boil Order on its citizens, that restriction was imposed by the Department of Health and Hospitals[38].

The issue of turbidity or water clarity was the only reason that DHH issued the Boil Notice. There was never an issue of Ferriday water being toxic or non-consumable. The Exception of No Cause/No Right of Action should have been granted by the Trial Court, the suit against the Town should have been dismissed.

Alternatively, the Town's providing water to its citizens is a discretionary function, and therefore the Town is protected by Discretionary Act Immunity. By alleging strict liability Mrs. Martello has placed the issue of Discretionary Act Immunity at the forefront of her suit. Discretionary Act Immunity is governed by **La. R.S. 9:2798.1** as follows:

> F. "Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policy

---

[37] ***Begnaud v. Camel Contractors, Inc., 721 So.2d 550 (La. App. 3Cir. 1998).***

[38] No claim has been asserted by the putative plaintiffs against the Louisiana Department of Health and Hospitals.

making or discretionary acts when such acts are within the course and scope of their lawful powers and duties."

The Town has no statutory or jurisprudential duty to provide its citizens with drinking water. The fact that such a decision was made indicates its discretionary nature. Providing of fluoride to a municipal water supply, has been found a "discretionary act", and related to the "health, safety, convenience, and general welfare" of its citizens.[39] Further, a DHH decision not to warn the general public of bacteria dangers related to the ingestion of raw oysters was deemed discretionary, and subject to immunity.[40] A Dock Board's decision to restrict fishing in certain areas of Lake Pontchartrain was deemed discretionary.[41] Finally, the Louisiana Second Circuit Court of Appeal held that a municipality's decision to apply the proceeds of an electricity rebate to capital improvements of the electrical plant rather than distribute the proceeds to utility customers was soundly within the City's discretion and legislative authority.[42]

A governmental entity's choice to provide water to its citizens should protect it from suit. The Courts should not restrict legislative discretion in policy formation or its implementation by imposing tort liability for discretionary decisions.[43] When discretion is involved, the Court must determine whether that discretion is the kind which is shielded by the Exception; i.e., one that is grounded in social, economic, or political policy.[44] The providing of drinking water by the Town of Ferriday is governed by **Louisiana Revised Statutes, 33:3811 through 33:3837.** Public

---

[39] ***Attaya v. Town of Gonzales, 192 So.2d 188 (La. App. 1Cir. 1966).***

[40] ***Simeon v. Doe, 618 So.2d 848 (La. 1993).***

[41] ***Boguille v. Chambers , 685 So.2d 582 (La. App. 4 Cir. 12/11/96).***

[42] ***Michael v. City of Minden, 704 So.2d 409 (La. App. 2 Cir. 1997).***

[43] ***Hardy v. Bowie, 744 So.2d 606, 613 (La. 1999).***

[44] ***Hardy v. Bowie, Supra citing Berkovitz v. U.S., 486, U.S. 531, 108 S.Ct. 1954, 100 l. Ed. 2d 531 (1988).***

utilities are governed by **La. R.S. 33:4161 *et. seq***. The Town is entitled to the protection of Discretionary Act Immunity contained in **La. R.S. 9:2798.1** because providing water to its citizens is a discretionary act related to the social, economic and political policies of health, safety and general welfare. Mayor Montgomery testified that the Town had the sole discretion to place its funds where necessary to run the Town and provide services to its citizens, including providing water to its citizens. For these reasons, it is respectfully requested that this Honorable Court grant the Town's writ application, and reverse the lower courts' decisions denying the Town's exceptions.

(2) This case is not suitable as a class action because it does not advance or preserve the intertwined goals of effectuating substantive law, judicial efficiency, and avoiding undesirable and unfair results to the parties.

The Louisiana Supreme Court has held that, under certain circumstances, the existence of individual causation and liability issues as to each potential class member may so predominate over common issues that class certification is inappropriate.[45] The case at bar is such a case when due process rights of potential class members are implicated by the lone plaintiff and class representatives' unique damage issues. Class certification in Louisiana is recognized in the ***Duhe v. Texaco, Inc.***[46] decision as being virtually identical to the requirements of **Federal Rule 23.**[47] This Honorable Court's decisions to decertify class actions considering the **Rules Enabling Act's** admonition that rules of procedure shall not abridge, enlarge or modify any substantive

---

[44] ***Bernard v. Thigpen Construction Company, et al, 97-1877 (La. 11/21/97) 702 So.2d 1387.***

[46] ***Duhe v. Texaco, Inc. 99-2002 (La.App. 3 Cir. 2/7/01), 779 So.2d 1070.***

[47] ***Acts 1997, No. 839, §1, eff. July 1, 1997.***

right, should be considered in this case.[48]

The primary issue considering **Article 591** in this case is whether common questions of law or fact predominate over individual issues and whether the class action is superior to other procedural methods available. This requirement significantly limits class actions, considering the additional **Louisiana Code of Civil Procedure's** restriction that certification not depend on individual proof unique to individual class members.[49] In this case, class representatives report business losses, but the vast majority of the claims concern minor misery, nuisance and aggravation, without further showing of damages. Class actions do not serve to effectuate substantive law or the policies underlying causes of action when, by use of the procedure, claims are given substance that, when pursued individually, have none under the law. This is the distortion effect recognized in ***McCastle***, ***Ford***, and ***Hampton***.[50] Despite their recitation of certification requirements, none of the lower courts made any serious inquiry into the substantive law applicable to the purported class of aggrieved persons, or the effect of the Town's affirmative defense of Discretionary Act Immunity, the individual issue predominance and availability of alternative joinder methods.

One undesirable end specifically identified by the Louisiana Supreme Court in ***Ford v. Murphy Oil USA, Inc.,***[51] where a class of 4,009 persons claiming minor physical injuries caused by the emissions from four petrochemical plants was

---

[48] ***Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) citing Amchem Products v. Windsor, 521 U.S. at p. 613 (1997).***

[49] ***Article 591C.***

[50] This analysis to determine whether the class action effectuates the policies underlying substantive law does not conflict with the admonition that district courts not be concerned with whether plaintiffs will prevail in the merits or even if they have asserted a cause of action. See, e.g., ***Hampton, 730 So.2d at6 1093; Doerr v. Mobil Oil Corporation, 01-0775 (La.App. 4Cir. 2/27/02), 2002 WL 334679 (not yet released for publication), both citing Miller v. Mackey International, Inc., 452 F.2d 424, 427 (5th Cir. 1971).***

[51] ***96-2913 (La. 9/9/97), 703 So.2d 542.***

decertified because individual issues of causation predominated over common issues of the defendants' alleged fault as follows:

> In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely the defendant will be found liable and results in significantly higher damage awards.
>
> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.[52]

That danger is echoed in Judge Kuhn's concurring opinion in ***Hampton***, cited and discussed above. The Louisiana courts' collective conclusions affirming certification resulted from insufficient analysis and an insufficient exercise of discretion.

CONCLUSION

The plaintiff, and putative class representatives, are straining to characterize this case of "glorified misery," and turn it into a "mass disaster tort suit" like the ***McCastle v. Rollins Environmental Services of Louisiana, Inc.***[53] case. In the ***Rollins*** case, 4,000 residents sustained minor and temporary physical injuries allegedly caused by the actions of a single defendant who polluted the air that purported class members all breathed. Except for the identification of the Town's water plant as the sole source of water in Ferriday, there are no other similarities between the case at bar and the ***McCastle v. Rollins*** case. Class

---

[52] *Id.*, quoting ***Castano v. American Tobacco Co.***, ***84 F.3d 734, 746 (5Cir. 1996)(citations omitted)***. The last sentence of the quoted paragraph reads: "These settlements have been referred to as judicial blackmail."

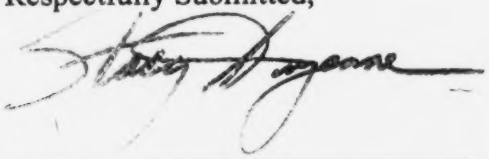
[53] ***456 So.2d 612 (La. 1984).***

members in ***McCastle*** **actually breathed polluted air** and **sustained actual physical injury**, however minor or temporary. In the case at bar, there has been no evidence whatsoever that the Town's water was polluted, that any of the residents drank it during the Boil Notice, or were injured even if they had. To the contrary, Town employees testified that they brushed their teeth in the water and bathed in it during the Boil Notice, without suffering any harm.

This case involves the assertion of what amounts essentially to individual claims of frustration, annoyance, and inconvenience, resulting from years of alleged uncontrollable levels of Manganese, over which the Town, Owen & White, and US Filter had no control. Manganese, while unpleasant, is not a health hazard, and is not something that the Town could control in Marengo Bend, the source of its water. The five class representatives may be expressing frustration at the fact that the Boil Order was the "final straw". Irritation over having to boil drinking water does not justify a class action lawsuit. However creative the attorneys can be in characterizing this case as a mass tort case, this Honorable Court should look at Louisiana and federal jurisprudence to determine whether there is any merit to what amounts to a glorified nuisance claim. If the class certification is allowed to stand, then the floodgate of class action suits will open, allowing persons with no damages to extort settlements from small municipalities across Louisiana and this Country. Most small municipalities will not be able to afford to provide basic services to their residents. Who then will benefit from class action suits? The people purportedly whose rights are being trampled will experience firsthand hardship as a result of class action lawsuits.

For the foregoing reasons, the Town of Ferriday Prays that this writ application be granted for full briefing and argument, or alternatively, that a peremptory writ be issued reversing the decisions of the Louisiana courts, de-certifying this class, and remanding the case for further proceedings as an ordinary action.

Respectfully Submitted,



STACY C. AUZENNE, P.L.C. (#21995)
RANDALL B. KEISER, P.L.C (#20894)
PAUL BOUDREAUX, JR. P.L.C. (#3303)
KEISER, AUZENNE & BOUDREAUX, L.L.C.
Attorneys at Law
P.O. Box 12358
5216 Rue Verdun
Alexandria, Louisiana 71315-2358
Telephone: (318) 443-6168
Fax: (318) 443-6211
ATTORNEYS FOR THE TOWN OF FERRIDAY, WRIT APPLICANT

Supreme Court, U.S.
FILED

02 552 SEP 4 - 2002

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

NO.

GLORIA B. MARTELLO
Plaintiff

VS.

TOWN OF FERRIDAY, OWEN & WHITE, INC.
And US FILTER WASTEWATER GROUP, INC.
Defendants

Appendix to the Petition for Writ of Certiorari to the Court of Appeals of Louisiana, Third District

---

A CIVIL ACTION

APPLICATION OF THE TOWN OF FERRIDAY
FOR A WRIT OF CERTIORARI OR REVIEW

STACY C. AUZENNE, P.L.C. (#21995)
RANDALL B. KEISER, P.L.C. (#20894)
PAUL BOUDREAUX, JR., P.L.C. (#3303)
KEISER, AUZENNE & BOUDREAUX, L.L.C.
Attorneys at Law
P.O. Box 12358
Alexandria, Louisiana 71315-2358
Telephone:(318) 443-6168
Attorneys for the Town of Ferriday, Applicant

Appendix A

Appendix B

Appendix C

BEST AVAILABLE COPY

113 pp

P

Publisher's Note:

age(s) i - iv missing in original document

APPENDIX/CITATIONS OF OPINIONS BY LOWER COURTS

Appendix A	Judgment of the District Court, signed July 25, 2001, Civil Action: 36,358-A, 7th Judicial District Court, Concordia Parish, Louisiana.
Appendix B	Written Reasons of the District Court, signed July 25, 2001, Civil Action: 36,358-A, 7th Judicial District Court, Concordia Parish, Lousiana.
Appendix C	Decision of the Third Circuit Court of Appeal on original Application dated March 6, 2002 ***Martello v. City of Ferriday, 01-1240 (La. App. 3 Cir. 3/6/02) 2002 WL 356167***
Appendix D	Decision of the Third Circuit Court of Appeal upon the Town's Application for Rehearing dated May 1, 2002, Docket No. 01 01240-CA.
Appendix E	Writ Application denial by Louisiana Supreme Court on Class Certification and Discretionary Act Immunity issues dated June 7, 2002, No. 2002-C-1514.

FORM: 305

SEVENTH JUDICIAL DISTRICT COURT

{NOTICE OF SIGNING OF JUDGMENT IN COMPLIANCE WITH ART. 1913 OF THE LA CCP]

PARISH OF CONCORDIA

STATE OF LOUISIANA

36358-A

GLORIA B. MARTELLO

V.

CITY OF FERRIDAY ET AL

CERTIFIED COPIES ATTACHED
REASONS FOR JUDGMENT
AND
JUDGMENT ON CLASS CERTIFICATION

TO: **RANDALL B. KEISER**
ATTORNEY AT LAW
P O BOX 12394
ALEXANDRIA LA 71315

PARISH OF: **RAPIDES**

You are hereby notified that a **JUDGMENT** was signed on **July 25, 2001,** in the above entitled and numbered cause.

The attached is a true and correct copy of said judgment.

Issued by the Clerk of Court on July 26, 2001.

_____
Deputy Clerk of Court for
Clyde R. Webber, Jr. Clerk of Court

Appendix E
Appendix B
Appendix C
Appendix D

CERTIFICATE OF MAILING

I, Sue Cole, Deputy Clerk of Court in and for the Parish of Concordia, State of Louisiana, Seventh Judicial District Court, hereby certify that on **JULY 26, 2001**, a certified copy of the **JUDGMENT** in the above styled and numbered cause was mailed to above counsel of record, for the party herein named.

_____

Deputy Clerk of Court for
Concordia Parish, Louisiana

GLORIA B. MARTELLO, 7TH JUDICIAL DISTRICT COURT
Plaintiff,

VERSUS PARISH OF CONCORDIA

CITY OF FERRIDAY, and OWEN and WHITE, INC., STATE OF LOUISIANA
Defendants

CIVIL ACTION: 36,358, A

FILED: _____

JUDGMENT

The Court, having considered the applicable law, the evidence, the testimony, the argument and briefs of counsel, and for the Reasons assigned this same date,

IT IS ORDERED, ADJUDGED, AND DECREED that the plaintiff's Motion for Class Certification be and hereby is **GRANTED.**

The Court finds that the Class as certified herein satisfies the statutory requirements of numerosity, commonality, typicality, adequacy of representation by the proposed Class Representatives and by their counsel, and that the class definition (below) is sufficiently specific and objective such that all Class members will be fairly and adequately placed on notice of the pendency of this

Appendix E
Appendix B
Appendix C
Appendix D

Class Action and of their right to participate in it. La. C.C.P. art. 591. The Court's findings of fact and conclusions of law pertaining to each of these criteria are contained in the Reasons for Judgment assigned this same date.

The Court further enters Judgment herein in favor of the plaintiff, and against the Town of Ferriday, Owen & White, Inc., and US Filter Waste Water Group, Inc., granting the Motion for Class Certification against all three defendants pursuant to Louisiana Code of Civil Procedure article 591 (B)(3). The evidence presented at the Class Certification hearing satisfies the Court that the common issues of liability and fault raised by the Class members against all three defendants predominate over the Class members individual claims for damages. The Class members' testimony satisfies the Court that their claims for damages differ only by degree or amount, but they are all of the same common types and categories, predominantly being claims of inconvenience, annoyance, and discomfort; mental and emotional distress and stress; non-reimbursed personal expenses; and also non-reimbursed business expenses.

The Court also finds that the Class Certification hearing

itself, conducted for four (4) days, with all witnesses testifying live before the Court (for a total of approximately 30 hours of live testimony; none by deposition), demonstrates the procedural advantage of trying the Class members' common issues of liability and fault against all three defendants in one common trial, at one time. This is especially true since there was no expert testimony offered by any party at the Class Certification hearing on the cause of the Ferriday water problems or on the cause of the 1999 "Boil Water" crisis. It is clear to the Court that any such expert testimony would be common to all Class members, and that trying the defendants' liability and fault in one common trial is superior to the other available procedural methods of either mass joinder and consolidation, or repetitive individual trials.

The Court finds, therefore, that the criteria of Louisiana Code of Civil Procedure article 591(B)(3), which requires that the common issues must predominate over the individual ones, and which also requires that the class action procedure must be superior to other available procedural methods for managing and trying this case, is satisfied in this case as to all three defendants. The Court's

Appendix E
Appendix B
Appendix C

findings of fact and conclusions of law pertaining to this criteria are contained in the Reason for Judgment assigned this same date.

IT IS FURTHER ORDERED and the evidence in the record satisfies the Court that it is appropriate and reasonable for the Class to be defined as:

> All persons, businesses, or entities who belong to at least one of the following give groups, and who, as a direct result of receiving their water from the Town of Ferriday Water Plant between August 20, 1999 and December 22, 1999, have at least one of the following claims: mental and emotional distress; non-reimbursed personal expenses; non-reimbursed business expenses; loss of personal incomes; loss of business income; annoyance, discomfort, and inconvenience; personal injury including fear of contraction of disease or illness; or property damage.

1. Residents of the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and who received their water supply to that residence from the Town of Ferriday Water Plant;

2. Owners and/or operators of businesses in the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and that received their water supply to that business from the Town of Ferriday Water Plant;

3. Lessors of residential and/or commercial property located in the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and that received their water supply to that property from the Town of Ferriday Water Plant;

4. Employees of businesses in the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and that received their water supply at their place of employment from the Town of Ferriday Water Plant; and

5. School students or patients in health care facilities who were required to be in the Town of Ferriday at any time between August 20, 1999 and December 2, 1999, and that received their water supply at their school or health care facility from the Town of Ferriday Water Plant.

The Court's findings of fact and conclusions of law pertaining to the Class definition are contained in the Reasons for Judgment assigned this same date.

IT IS FURTHER ORDERED and the Court finds that the following five (5) persons, who testified about their claims and their desire to be appointed as Class Representatives, be and hereby are confirmed as representatives of the Class certified herein:

1. Gloria Martello
2. Thomas Massey
3. Shelby Guidry
4. Mildred McKinney
5. Christine Roberts

The evidence that was presented at the Class Certification

Appendix E
Appendix B
Appendix C

hearing satisfies the Court that the claims of the five (5) Class Representatives and the claims of the absent Class members (defined above) have a common character that predominates over their individual differences, and that the claims of these Class Representatives are typical of the claims of the members of the Class certified herein. The Court also finds that none of the above-named Representatives has any interest in the outcome of this Class Action litigation that is adverse to the interest of the absent members of the Class, and that each of the Class Representatives have demonstrated that they are able and willing to serve in the capacity of a Class Representative. The Court's findings of fact and conclusions of law pertaining to this criteria are contained in the Reasons for Judgment assigned this same date.

IT IS FURTHER ORDERED and the Court finds that the following attorneys have the necessary skills, background, expertise and experience, and absence of any conflict of interest, in order to be designated as Class Counsel, and are hereby appointed as such: 1. Charles S. Norris, Jr., Liaison Counsel for the Class, of Vidalia, Louisiana; and 2. Stephen B. Murray; 3. Linda S. Harang; and 4.

Julie A. Jacobs, all of the Murray Law Firm, New Orleans, Louisiana. The Court's findings of fact and conclusions of law pertaining to this criteria are contained in the Reasons for Judgment assigned this same date.

IT IS FURTHER ORDERED that Class Counsel are hereby authorized to give proper Notice, as required by law and consistent with this Court's Reasons for Judgment, to all putative Class members, of the pendency of this Class Action and of their rights to participate in it. The Court must review and approve the content, form, and publication details of said Notice.

IT IS FURTHER ORDERED that all communications with the Class Representatives and the putative Class members regarding their claims in this Class Action must first be presented to the Court and receive the Court's prior approval. Communications between Class Counsel and the Class Representatives and between Class Counsel and their own clients who are putative Class members are not subject to this requirement.

IT IS FURTHER ORDERED that the Court finds that the Exception of No Cause of Action of the Town of Ferriday,

Appendix E
Appendix B
Appendix C

challenging the plaintiff's request for class certification (which originally was brought as a exception of no right of action, but was conformed at the beginning of the Class Certification hearing by consent of all parties and with leave of Court into the Exception of No Cause of Action), is hereby **OVERRULED** for all the same Reasons for Judgment assigned herein.

JUDGMENT READ, RENDERED AND SIGNED at Vidalia, Louisiana, this _____ day of July, 2001.

_____

HON. KATHY JOHNSON
DISTRICT JUDGE
7TH Judicial District Court

CLERK OF COURT:

SERVE ALL PARTIES WITH THIS JUDGMENT, AND WITH THE REASONS FOR JUDGMENT ASSIGNED THIS SAME DATE.

Appendix E

Appendix B

Appendix C

Appendix D

GLORIA B. MARTELLO, **7TH JUDICIAL DISTRICT COURT**
Plaintiff,

VERSUS **PARISH OF CONCORDIA**

CITY OF FERRIDAY, and OWEN and WHITE, INC., **STATE OF LOUISIANA**
Defendants

CIVIL ACTION: 36,358, A

FILED: _____

REASONS FOR JUDGMENT

Pursuant to its authority and duty under article 592(A)(3)(a) of the Louisiana Code of Civil Procedure, this Court held an evidentiary hearing on the plaintiff's Motion for Class Certification, and on the Town of Ferriday's Exception of No Cause of Action challenging the plaintiff's request for certification. The hearing was held in Concordia Parish, Vidalia, Louisiana, for four (4) days, on April 30, 2001, and on May 1, 3, and 4, 2001. All testimony was presented live; none was presented by deposition. The Court heard testimony from twelve (12) witnesses; 56 exhibits were accepted into evidence, 10 exhibits were proffered.

Prior to the hearing, the parties entered into a Stipulation (which is filed into the record) as to the requirements of numerosity

Appendix E
Appendix C
Appendix D

and adequacy of representation by the Class members and their counsel. The Court considers this Stipulation binding on the parties but not on the Court. *See Cotton v. Gaylord, 96-1958*, at 12-13 (La. App. 1st Cir. 3/27/97); 691 So.2d 760, 768. The Court, therefore, has conducted its own review of the evidence on these two criteria.

The issues before the Court at the Class Certification hearing were:

1. Whether the proposed Class satisfies the numerosity requirement. La. C.C.P. art. 591(A)(1).

2. Whether the proposed Class satisfies the commonality requirement. La. C.C.P. art. 591(A)(2).

3. Whether the proposed Class satisfies the typicality requirement. La. C.C.P. art. 591(A)(3).

4. Whether the proposed Class satisfies the adequacy requirement. La. C.C.P. art. 591(A)(4).

5. Whether the proposed Class is defined objectively in terms of ascertainable criteria. La. C.C.P. art. 591(A)(5).

6. Whether the proposed Class satisfies one or more of the criteria of article 591(B). La. C.C.P. art. 591(B).

The Court finds that all of the statutory requirements for Class Certification are met in this case. The Court, by its Judgment entered this date, certifies this case for management and trial as a Class

Action, under article 591(B)(3), with the Class defined as:

All persons, business, or entities who belong to at least of the following five groups, and who, as a direct result of receiving their water from the Town of Ferriday Water Plant between August 20, 1999 and December 22, 1999, have at least one of the following claims; mental and emotional distress; non-reimbursed personal expenses; non-reimbursed business expenses; loss of personal income; loss of business income; annoyance, discomfort, and inconvenience; personal injury including fear of contraction of disease or illness; or property damage.

1. Residents of the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and who received their water supply to that residence from the Town of Ferriday Water Plant;

2. Owners and/or operators of businesses in the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and that received their water supply to that business from the Town of Ferriday Water Plant;

3. Lessors of residential and/or commercial property located in the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and that received their water supply to that property from the Town of Ferriday Water Plant; and

4. Employees of businesses in the Town of Ferriday or any adjacent community at any times between August 20, 1999 and December 22, 1999, and that received their water supply at their place of employment from the Town of Ferriday Water Plant.

5. School students or patients in health care facilities who were required to be in the Town of Ferriday at any time between August 20, 1999, and December 22, 1999, and that received their water supply at their school or health care facility from the Town

of Ferriday Water Plant.

The Court's findings of fact and conclusions of law upon which its Judgment are based are as follows:[1]

Findings of Fact

1. The Town of Ferriday, Louisiana, is located in Concordia Parish, Louisiana, and at all relevant times has had a population of approximately 4,500 residents. [Testimony of William McKeel, Odeal Montgomery, Plaintiff's Ex. 278]

2. At relevant times, the residences and businesses of the Town of Ferriday, and of the adjacent unincorporated areas, including Red Gum and Lake St. John, received their potable (i.e. drinkable) water supply from the Town of Ferriday's water treatment plant. [Testimony of William McKeel, Odeal Montgomery, Michael Cazes, William Derrick Wilson]

---

[1] To the extent that the following findings of fact include conclusions of law or mixed findings of fact and conclusions of law, those findings are hereby adopted by the Court as conclusions of law. Similarly, to the extend that the conclusions of law contain findings of fact or mixed conclusions are hereby adopted by the Court as findings of fact.

3. At all relevant times, the Town of Ferriday has had only one water treatment plant that supplied potable water to the residences and businesses of Ferriday and the adjacent unincorporated areas, including Red Gum and Lake St. John. [Testimony of William McKeel, Odeal Montgomery, Michael Cazes, William Derrick Wilson]

4. At all relevant times, the Town of Ferriday supplied potable water to the residences and businesses of Ferriday and the adjacent unincorporated areas, including Red Gum and Lake St. John, and billed its water customers monthly for the water they used. [Testimony of Gloria Martello, Tommy Massey, Shelby Guidry, Mildred McKinney, Christine Roberts]

5. The Town of Ferriday contracted with the Baton Rouge engineering firm of Owen & White, Inc., in October 1978 for the purpose of designing a new water treatment plant for the Town of Ferriday, and for the adjacent communities that are supplied by the Town's water treatment plant. [Testimony of Eugene Owen; Plaintiff's Ex. 152]

6. Owen & White investigated whether the "old" water treatment

Appendix E
Appendix C
Appendix D

plant should be upgraded and/or modified, and concluded that it was not cost-effective for the Town of Ferriday to do so. [Testimony of Eugene Owen]

7. Owen & White recommended that the Town of Ferriday build a new treatment plant, and the Town accepted the recommendation. [Testimony of Eugene Owen]

8. Owen & White investigated the use of several possible sources of raw water for the new water treatment plant. [Testimony of Eugene Owen]

9. Owen & White recommended the use of Old River, also called Marengo Bend, as the source of the raw water for the new treatment plant, and the Town of Ferriday accepted the recommendation. [Testimony of Eugene Owen]

10. The water in Marengo Bend comes from the Mississippi River. [Testimony of Eugene Owen, Bryant Hammett]

11. In February 1982, Owen & White recommended a conventional type water treatment plant to the Town of Ferriday. This design used, as its primary filtration components, tube settlers and a sedimentation process. [Testimony of Eugene Owen; Plaintiff's

Ex. 1]

12. In the Fall of 1982, Owen & White changed its proposal and recommended that the Town of Ferriday consider using, as the primary filtration component of its new water treatment plant, a packaged water treatment plant designed and manufactured by Neptune Microfloc (the corporate predecessor in interest to defendant USFilter Water Waste Group, Inc.). [Testimony of Eugene Owen; Plaintiff's Ex. 136]

13. In order to determine whether Neptune Microfloc equipment would adequately treat and filter the raw water in Marengo Bend, Neptune proposed performing a "pilot water plant" study, using a scale model of its equipment at Marengo Bend for a period of one week. [Testimony of Eugene Owen; Plaintiff's Ex. 129]

14. Owen & White advised the Town of Ferriday to agree to the "pilot water plant" study, and the Town agreed. [Testimony of Eugene Owen; Plaintiff's Ex. 130, 136]

15. The "pilot water plant" study was performed for 2-3 days in May 1983 at Marengo Bend [Testimony of Eugene Owen]

16. Neptune Microfloc gave Owen & White a summary of its findings from the "pilot water plant" study in June 1983, and reported that its equipment would be able to successfully treat and filter the water from Marengo Bend. [Testimony of Eugene Owen; Plaintiff's Ex. 41]

17. Based on the outcome of the "pilot water plant" study, Owen & White recommended that the Town of Ferriday accept its design for the new water treatment plant incorporating the Neptune Microfloc packaged water treatment plant, and the Town accepted the recommendation. [Testimony of Eugene Owen]

18. The new water treatment plant was constructed and began operating in December 1988. Since that time, it has been the only water treatment plant that supplies potable water to the residences and businesses of the Town of Ferriday and the adjacent unincorporated areas, including Red Gum and Lake St. John. [Testimony of William McKeel, Odeal Montgomery, William Derrick Wilson, Michael Cazes; Plaintiff's Ex. 302, 305]

19. In August 1999, the Louisiana State Department of Health and

Hospitals issued for a "Boil Water Advisory" and several days later a "Boil Water Notice" for everyone who received their potable water from the Town of Ferriday's water treatment plant. [Testimony of Michael Cazes; Owen & White Ex. 5]

20. No one was excluded from the "Boil Water Advisory" or from the "Boil Water Notice". All residences and businesses that were supplied by the Town of Ferriday's water treatment plant were included. [Testimony of Michael Cazes]

21. The Louisiana State Department of Health and Hospitals' "Boil Water Advisory" and "Notice" instructed everyone using the Town of Ferriday's water supply that before they could use the Town's water for drinking, cooking, washing hands, or bathing, it first had to be brought to a "rolling" boil for at least 5 minutes. [Testimony of Michael Cazes; Owen & White Ex. 5]

22. The Louisiana State Department of Health and Hospitals gave the same set of instructions for the "Boil Water Advisory" and "Notice" to all residences and businesses that were supplied by the Town of Ferriday's water treatment plant. [Testimony of Michael Cazes]

23. The "Boil Water Advisory" was issued on the same day for all residences and businesses that were supplied by the Town of Ferriday's water treatment plant. [Testimony of Michael Cazes]

24. The "Boil Water Notice" was issued on the same day for all residences and businesses that were supplied by the Town of Ferriday's water treatment plant. [Testimony of Michael Cazes]

25. The "Boil Water Notice" was lifted on the same day, December 22, 1999, for all residences and businesses that were supplied by the Town of Ferriday's water treatment plant. [Testimony of Michael Cazes].

26. During the approximately four (4) months that the Ferriday water customers were under the "Boil Water Notice", the National Guard supplied potable water to the Town of Ferriday in tanker trucks. Residents could draw water from the trucks into jars, jugs, bottles, buckets, or any other type of container. [Testimony of Odeal Montgomery, Gloria Martello, Mildred McKinney, Tommy Massey].

27. Mrs. Odeal Montgomery, who was the Mayor of the Town of Ferriday during the four (4) months of the "Boil Water Notice",

described the "Boil Water Notice" as "perilous times". [Testimony of Odeal Montgomery; Plaintiff's Ex. 319]

28. Gloria Martello is a life-long resident of the Town of Ferriday. She is the owner and operator of Brocato's Restaurant in Ferriday. At all relevant times, the water at her home and her business was supplied by the Town of Ferriday's water treatment plant. [Testimony of Gloria Martello; Plaintiff's Ex. 292, 293]

29. Mrs. Martello testified that during the "Boil Water Notice" she could not use the salad bar in her restaurant because she could not use her ice maker to supply the ice. She bought ice every day to serve in drinks, and she bought water or paid someone to haul water from the National Guard truck every day for cooking and washing dishes. She testified that she could not use her soft drink dispenser because it is connected to her water line; so she bought canned soft drinks for her customers. [Testimony of Gloria Martello]

30. Mrs. Martello testified that her claims include: mental and emotional distress and stress; non-reimbursed business expenses; loss of business income; annoyance, discomfort, and

Appendix E
Appendix C
Appendix D

inconvenience. She also testified about her understanding of a class action and the duties and responsibilities of a Class Representative. [Testimony of Gloria Martello]

31. Tommy Massey is a resident of Vidalia, Louisiana, and for the past 28 years has been the Administrator of Heritage Manor Nursing Home in the Town of Ferriday. At all relevant times, the water at the Heritage Manor Nursing Home was supplied by the Town of Ferriday's water treatment plant. [Testimony of Tommy Massey]

32. Mr. Massey testified that during the "Boil Water Notice" he and his staff could not use the water supply in a routine, ordinary manner. Mr. Massey testified about the problems he and his staff had with cooking and food preparation, with bathing and cleaning the residents, and doing all the laundry every day. [Testimony of Tommy Massey]

33. Mr. Massey testified that his claims include: mental and emotional distress and stress; non-reimbursed business expenses; and annoyance, discomfort, and inconvenience. He testified about his understanding of a class action and the duties and

responsibilities of a Class Representative. [Testimony of Tommy Massey]

34. Shelby Guidry is a resident of Ridgecrest, Louisiana, and for the past nine (9) years she had been the owner and operator of Guidry's Laundromat in the Town of Ferriday. At all relevant times, the water used at Guidry's Laundromat was supplied by the Town of Ferriday's water treatment plant. [Testimony of Shelby Guidry; Plaintiff's Ex. 294]

35. Mrs. Guidry testified that during the "Boil Water Notice" she was not able to use her special water filtration system in the way it was designed to be used. Her customers had problems with the water staining their clothes. When this happened, Mrs Guidry re-washed their clothes at her expense. She testified that she lost business during the "Boil Water Notice" due to the water problems. [Testimony of Shelby Guidry]

36. Mrs. Guidry testified that her claims include: mental and emotional distress and stress; non-reimbursed business expenses; loss of business income; annoyance, discomfort, and inconvenience; and property damage to her filtration system. She

testified about her understanding of a class action and the duties and responsibilities of a Class Representative. [Testimony of Shelby Guidry]

37. Mildred McKinney is a resident of the Red Gum area of Ferriday, Louisiana, and works at the Wal-Mart in the Town of Ferriday. At all relevant times, the water at Mrs. McKinney's home and the business where she works was supplied by the Town of Ferriday's water treatment plant. [Testimony of Mildred McKinney; Plaintiff's Ex. 297]

38. Mrs. McKinney testified that during the "Boil Water Notice" she either bought water at Wal-Mart for her family, or she hauled water from the National Guard tank truck or from the house of a relative who lives several miles outside of Ferriday. She testified that she had problems doing her family's laundry, cooking, and bathing. [Testimony of Mildred McKinney]

39. Mrs. McKinney testified that her claims include: mental and emotional distress and stress; non-reimbursed personal expenses; annoyances, discomfort, and inconvenience; and fear of disease or illness particularly for her children and her disabled husband.

She testified about her understanding of a class action and the duties and responsibilities of a Class Representative. [Testimony of Mildred McKinney]

40. Christine Roberts is now a resident of Natchez, Mississippi. When the "Boil Water Notice" went into effect, Mrs. Roberts lived in the Town of Ferriday with her husband and her four children. They owned a home subject to a mortgage. At all relevant times, the water at their home in Ferriday was supplied by the Town of Ferriday's water treatment plant. [Testimony of Christine Roberts; Plaintiff's Ex. 296]

41. Mrs. Roberts testified that within a few days after the "Boil Water Notice" started, she and her family left Ferriday because of the hardships that she claims were caused by the water problems. They moved into a vacant, family-owned home in Natchez, Mississippi. She testified that they commuted between Natchez and Ferriday to get clothes, check on their mail, get the children's toys, and check on their house. They still own the house in Ferriday. [Testimony of Christine Roberts]

42. Mrs. Roberts testified that her claims include: mental and

emotional distress and stress; non-reimbursed personal expenses; annoyance, discomfort, and inconvenience; and fear of disease or illness. She testified about her understanding of a class action and the duties and responsibilities of a Class Representative. [Testimony of Christine Roberts]

43. Each Class Representative testified that he or she is willing and able to perform the duties and responsibilities of a Class Representative. [Testimony of Gloria Martello, Tommy Massey, Shelby Guidry, Mildred McKinney, Christine Roberts]

44. Within six (6) months after the new water treatment plant began operating, the Ferriday water customers complained about the quality of the water being produced by the new plant. [Testimony of Eugene Owen, Odeal Montgomery, Bryant Hammett; Plaintiff's Ex. 12/180; 184]

45. The source of the customers' complaints was determined to be an excessively high level of manganese in the raw water of Marengo Bend. [Testimony of Eugene Owen; Plaintiff's Ex. 13]

46. The excessively high level of manganese in the water in Marengo Bend was not detected in any of Owen & White's

water quality studies. [Testimony of Eugene Owen; Plaintiff's Exh. 184]

47. The excessively high level of manganese in the water in Marengo Bend was not reported by Neptune Microfloc in its summary of the May 1983 "pilot water plant" study. [Testimony of Eugene Owen; Plaintiff's Ex. 184]

48. In 1991, Owen & White wrote the Town of Ferriday and reported that the water plant was in "deplorable" condition due to improper maintenance and repair. [Testimony of Roy Waggenspack; Plaintiff's Ex. 166]

49. In 1994, the Town of Ferriday hired Civil Engineer Bryant Hammett to investigate the cause of the Town's continuing water problems. [Testimony of Bryan Hammett]

50. In 1996, the Town of Ferriday hired Owen & White to evaluate the water plant and recommend what needed to be done to get the plant in proper working condition. [Testimony of Eugene Owen, Odeal Montgomery, Roy Waggenspack; Plaintiff's Ex. 277]

51. In August 1999, just one (1) or two (2) days before the "Boil

Water Advisory" was issued, the Ferriday water plant experienced a complete shut down, leaving all Ferriday water customers without any water for three (3) days. [Testimony of William McKeel, William Derrick Wilson]

52. At the time of the August 1999 water plant shut down, the Town of Ferriday had not made all the repairs recommended by Owen & White in 1996. [Testimony of Roy Waggenspack, William Derrick Wilson]

53. At the time of the August 1999 water plant shut down, the Town of Ferriday was using most of its Water Department budget on the chemicals that were needed to treat the excessively high levels of manganese, leaving no funds available for maintenance or repairs. [Testimony of Odeal Montgomery, William Derrick Wilson]

54. At the time of the August 1999 water plant shut down and the issuance of the "Boil Water Advisory" and "Notice", William Derrick Wilson was the only certified operator at the Ferriday water treatment plant. [Testimony of William McKeel, William Derrick Wilson]

Conclusions of Law

1. Numerosity

The testimony from Water Plant Superintendent William McKeel and former Mayor Odeal Montgomery establishes that at all relevant times there were approximately 4,500 residents in the Town of Ferriday who received the water at their homes and businesses from the Town of Ferriday's water treatment plant. Additionally, there are residents of the adjacent areas of Red Gum (such as Mildred McKinney) and Lake St. John who receive their water from the Town of Ferriday's water treatment plant. This number of persons, who claim that they were similarly affected by the 1999 water plant failure and the "Boil Water Notice" is sufficient to satisfy the "numerosity" requirement. La. C.C.P. art. 591(A)(1).

A class action is appropriate whenever the interested parties appear to be so numerous that separate suits would unduly burden the courts, and a class action would "clearly be more useful and judicially expedient than the other available procedures. *"Cotton v. Gaylord Container,* 96-1958 at 14 (La. App. 1st Cir. 3/37/97); 691So.2d 760, 769, *writs denied,* 97-0800 and 0830 (La. 4/8/97); 693

So.2d 147. Our courts and our laws do not require a minimum number of persons, nor do they set a maximum number. The determination of whether this requirement has been fulfilled depends on the facts and circumstances of each individual case. *Cotton, supra,* 96-1958 at 14, 691 So. 2d at 768; *Dumas v. Angus Chemical Co.*, 25,632 at 6-7 (La. App. 2d Cir. 3/30/94); 635 So.2d 446, 450.

The Court finds that the testimony establishes that the facts and circumstances of this case, and the number of persons and businesses (at least 4,500) who claim that they were similarly affected by the Town of Ferriday's water problems in 1999, therefore, is sufficient to satisfy the "numerosity" requirement. La. C.C.P. art. 591(A)(1).

2. Commonality

The Court heard testimony from witnesses whose homes are supplied by the Town of Ferriday's water treatment plant (Gloria Martello, Christine Roberts, Mildred McKinney), or whose businesses are supplied by the Town of Ferriday's water treatment plant (Gloria Martello, Shelby Guidry, Tommy Massey), or who work at a business supplied by the Town of Ferriday's water treatment plant (Gloria Martello, Shelby Guidry, Tommy Massey,

Mildred McKinney).

All of these witnesses testified about the problems and complaints they had with the water produced by the Town of Ferriday's water treatment plant, and with the problems they claim they experienced during the four (4) months of the "Boil Water Notice". The witnesses testified about the problems they had with cooking, drinking, bathing, and doing laundry. Odeal Montgomery (who was the Mayor when the Town was placed under the "Boil Water Notice" in August 1999), described these four (4) months as "perilous times". The Court finds all of these witnesses to be credible and forthright in their testimony.

At this time, the Court is not asked to decide whether these claims are accurate, valid, or compensable. Nor is the Court asked at this time to decide who or what contributed to any of the Town of Ferriday's water problems, the August 1999 "shut down", or the August-December 1999 "Boil Water Notice". At this time, the Court is only required to determine whether these claims have a common character such that they satisfy the statutory requirement of "commonality". La. C.C.P. art. 591(A)(2).

All of the witnesses described having the same types of problems during the "Boil Water Notice". They testified about the same types of inconvenience, the same types of worries, the same types of stress, the same types of non-reimbursed personal expenses, and the same types of non-reimbursed business expenses.

Mr. Michael Cazes, an official with the Regional Office of the Louisiana State Department of Health and Hospitals, testified that the "Boil Water Notice" started on the same day for everyone, ended on the same day for everyone, and that everyone was under the same set of instructions about using the water for the entire period of time that the "Boil Water Notice" was in effect. Mr. Cazes testified that even though the water treatment plant was capable of producing water after the initial 3-day "shut down" the water was not potable (drinkable without first boiling it) until December 22, 1999, when the State lifted the "Boil Water Notice".

Based on all of this testimony, the Court finds that the only differences between the claims of these witnesses are differences of degree and amount. The nature of their claims is so similar as to be almost identical. In addition to the common nature of the witnesses'

claims, their testimony satisfies the Court that the claims about their water problems originate from the same common source - the Town of Ferriday's water treatment plant. Therefore, if any defendant is found to be liable to just one Class member due to that defendant's role in causing or contributing to the Class member's water-related complaints, then the finding of liability should be binding on that defendant as to all the other similarly situated Class members, without the need for every other Class member to have a trial on those same issues.

The Court understands and recognizes that there will be differences in the Class members' claims in the degree and amount of damages they seek, but the nature of their claims is common to the entire Class. Some may only have claims for lost personal expenses, whereas some may only have claims for lost business expenses, but the Court considers these to be differences of degree or amount. These individual differences in the exact type or amount of damages does not preclude or defeat class certification. *McCastle v. Rollins Environmental Services of Louisiana, Inc.*, 456 So.2d 612, 616 (La. 1982); *Livingston Parish Police Jury v. Acadiana Shipyards*, 598

So.2d 1177, 1183 (La. App. 1st Cir.), *writ denied*, 605 So2d 1122 (La. 1992); *Bartlett v. Browning-Ferris Industries Chemical Services, Inc.*, 99-494 (La. 11/12/99); 759 So.2d 755. It has been established that the existence of issues particular to individual members of the class does not defeat commonality. *McCastle, supra*, 456 So.2d at 620.

The Court finds that the claims of the Class members have a sufficient common character and are derived from a common source. Their claims against the defendants are directed at the common nature of the defendant's conduct. The Court finds, therefore, that the "commonality" requirement is satisfied in this case. La. C.C.P. art. 591(A)(2).

3. Typicality

The "typicality" criteria is a relatively new statutory requirement for certification.[2] Louisiana state courts, however, judicially adopted this requirement years ago, so it is not new to Louisiana class action

---

[2]This requirement was included in the 1997 revisions and amendments to the Louisiana class action articles, La. C.C.P. art. 591(A)(3) (eff. 7/1/97). It was not previously a statutory requirement in Louisiana.

jurisprudence. *See e.g. Adams v. CSX Railroads*, 615 So.2d 476, 482 (La. App. 4th Cir. 1993); *Dumas v. Angus Chemical Co.*, 25,632 at 6 (La. App. 2d Cir. 3/30/94); 635 So.2d 446, 450.

This criteria combines elements of commonality and adequacy by requiring that the Class Representatives assert claims that are typical or a cross-section of those asserted or raised by the rest of the members of the Class. This criteria also includes a consideration of the Class Representative' claims to determine whether any are adverse to or substantially different in general type from those asserted by the rest of the Class.

In every class action, except those primarily seeking injunctive relief, there are almost always differences between and among members of the Class in the amount and degree of damages each claims to have suffered. But these differences in degree or amount are not typicality factors. Typicality is only concerned with the types of claims being asserted, not with the degree or amount of damages being requested. *See Billieson v. City of New Orleans*, 98-1232 at 17 (La. App. 4th Cir. 3/3/99); 729 So.2d 146, 157, *writ denied*, 99-0946 (La. 10/29/99); 749 So.2d 644.

Each of the Class Representatives testified about the type and nature of their claims:

Mrs. Martello testified that she experienced mental and emotional distress and stress; non-reimbursed business expenses; loss of business income; annoyance, discomfort, and inconvenience. Mr. Massey testified that he experienced mental and emotional distress; non-reimbursed business and personal expenses; and annoyance, discomfort, and inconvenience. Mrs. Guidry testified that she experienced mental and emotional distress and stress; non-reimbursed business expenses; loss of business income, annoyance, discomfort, and inconvenience; and property damage. Mrs. Roberts testified that she experienced mental and emotional distress and stress; non-reimbursed personal expenses, annoyance, discomfort, and inconvenience. Mrs. McKinney testified that she experienced mental and emotional distress and stress; non-reimbursed personal expenses; annoyance, discomfort, and inconvenience; and fear of disease or illness for her family.

Each of the Class Representatives also testified about their residential or business relationship with the Town of Ferriday during

the "Boil Water Notice".

Mrs. Martello testified that she lives in the Town, owns and operates a business in the Town, works in the Town, and owns property in the Town. The water to her home and her business is supplied by the Town of Ferriday water treatment plant. Mrs. Guidry testified that she owns and operates a business and property in the Town and works in the Town. The water to her business is supplied by the Town of Ferriday water treatment plant. Mr. Massey testified that he operates a business in the Town and works in the Town. The water to the business he operates is supplied by the Town of Ferriday water treatment plant. Mrs. Roberts lived in the Town and still owns property in the Town. The water to her home in Ferriday is supplied by the Town of Ferriday water treatment plant. Mrs. McKinney lives and owns property in the Red Gum area of Ferriday, and works in the Town. The water to her home and the business where she works is supplied by the Town of Ferriday water treatment plant.

The Court finds that the testimony of these Class Representatives about the nature and type of their claims was direct and credible. It was not emotional, exaggerated or contrived. They each genuinely

expressed, in their own words, what they experienced during the "Boil Water Notice" and why they believe they should be compensated. Whereas the Court reaches no conclusions at this time about the merits of their claims, their testimony about the nature and type of their claims persuades the Court that their claims are, in fact, typical of all persons who were living in, working in, owning property in, and/or owning or operating a business in the Town of Ferriday during the "Boil Water Notice".

The Court finds that individually and as a group the claims of these Class Representatives are typical of the claims of the Class members because they are similar in nature, they arise from the same alleged course of each defendant's conduct, and they are all based on the same legal theories under Louisiana law. The Class Representatives demonstrated to the Court during their testimony that they are capable and prepared to represent the interests of the absent Class members.

The Court further finds that the Class Representative are typical within the meaning of that term in Louisiana class action jurisprudence because they each present claims that are a cross-

section of the Class they seek to represent. Louisiana's "adequacy of representation" criteria "requires that the claims of the class representatives be a cross-section of, or typical of, the claims of all class members. *"See e.g. Dumas, supra,* 635 So.2d at 450; *Livingston Parish, supra*, 598 So.2d at 1177; *Lailhengue v. Mobil Oil Co.*, 94-2114 at 5-6 (La. App. 4th Cir. 6/7/95); 657 So. 2d 542, 546; *Ford v. Murphy Oil,* 96-2913 at 4 (La. 9/9/97); 703 So.2d 542, 544. Louisiana, however, does not require that either the Class Representatives or their claims be identical to all the Class members or to any Class members within the Class. *Id.*

The Court finds that the five (5) appointed Class Representatives present claims that are typical of those likely to be presented by the absent members of the Class certified herein. Their claims are a cross-section of the claims of the Class members, and are derived from the same common source. Their claims against the defendants are typical of all claims directed at the common nature of the defendants' conduct. The Court finds, therefore, that the "typicality" requirement is satisfied in this case. La. C.C.P. art. 591(A)(3).

4. Adequacy of Representation

The evidence that was presented at the Class Certification hearing satisfied the Court that the claims of the five (5) persons now appointed to serve as Class Representatives and the claims of the absent Class members (defined above) have a common character that predominates over their individual differences, and that the claims of these five (5) Class Representatives and typical of the claims of the members of the Class certified herein. The Court finds that none of the Class Representatives has any personal or financial interest in the outcome of this Class Action litigation that is adverse to the interests of the absent members of the Class, and also that each of them has demonstrated that they are able and willing to serve in the capacity of a Class Representative. La. C.C.P. art. 591(A)(4).

Louisiana requires class actions to be litigated by and through one or more adequate representatives who participate on behalf of and for the absent class members. Satisfying this element requires the proposed Class Representatives to establish that their claims are "a cross-section of, or typical of, the claims of all class member." *Andry v. Murphy Oil, U.S.A., Inc.*, 97-0793 at 6 (La. App. 4th Cir. 4/1/98); 710 So. 2d 1126, 1130.

During the hearing, each proposed Class Representative testified before the Court about their personal and family background, their work background, their experiences with the Town of Ferriday's water, and of the hardships and problems they claim that they each suffered during the 1999 "Boil Water Notice". Each proposed Class Representative was questioned about the nature of their claims, their understanding of the nature of a class action, and their understanding of the role of a Class Representative. The Court finds that each of these witnesses was credible, candid and forthright in their answers, and that they each possess a good understanding of their role in this case.

The Court also finds that the following attorneys have the necessary skill, background, expertise, experience, and absence of any conflict of interest, in order to be designated as Class Counsel, and are hereby appointed as such. 1. Charles S. Norris, Jr., Liaison Counsel for the Class, of Vidalia, Louisiana; and 2. Stephen B. Murray; 3. Linda S. Harang; and 4. Jule A. Jacobs, all of the Murray Law Firm, of New Orleans, Louisiana.

Each of these counsel submitted as Affidavit to the Court, with

a curriculum vitae outlining their experience in litigation in general, and particularly in class action litigation. These Affidavits attest to their desire to be staunch advocates for the Class, and that they are financially able to fund this litigation for the Class. Their Affidavits attest that they are each free of any conflicts of interest. Each counsel also attached a current Certificate of Good Standing from the Louisiana Supreme Court as further evidence of their fitness to serve as Class Counsel. No evidence was introduced at the hearing to contradict or challenge any of the information in these Affidavits or curriculum vitae. Additionally, by their presentation to the Court of their witnesses and evidence during the Class Certification hearing, these counsel have demonstrated to the Court that they are able to adequately and ably represent the Class.

The Court finds, therefore, that as to the five (5) Class members now appointed to serve as Class Representatives, and as to the four (4) attorneys appointed to serve as Class Counsel, the "adequacy of representation" requirement is satisfied. La. C.C.P. art. 591(A)(4).

5. Adequate, Objective Class Definition

The evidence in the record supports the Court's decision to

define the Class as:

All persons, businesses, or entities who belong to at least one of the following five groups, and who, as a direct result of receiving their water from the Town of Ferriday Water Plant between August 20, 1999 and December 22, 1999, have at least one of the following claims: mental and emotional distress; non-reimbursed personal expenses; non-reimbursed business expenses; loss of personal income; loss of business income; annoyance, discomfort, and inconvenience; personal injury including fear of contraction of disease or illness; or property damage.

1. Residents of the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and who received their water supply to that residence from the Town of Ferriday Water Plant;

2. Owners and/or operators of businesses in the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and that received their water supply to that business from the Town of Ferriday Water Plant;

3. Lessors of residential and/or commercial property located in the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and that received their water supply to that property from the Town of Ferriday Water Plant; and

4. Employees of businesses in the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and that received their water supply at their place of employment from the Town of Ferriday Water Plant.

5. School students or patients in health care facilities who were required to be in the Town of Ferriday at any time between August 20, 1999 and December 22, 1999, and that received their water supply at their school or health care facility from the Town

of Ferriday Water Plant.

Several witnesses testified about the people, residences, and businesses that were included in the State's "Boil Water Advisory" and "Notice". William McKeel, who was the operator of the Ferriday water treatment plant at the time of the "Notice" testified that all residences and businesses supplied by the Ferriday water treatment plant were included in the "Notice". Then-Mayor Odeal Montgomery testified that when she received the information from the State, everyone was included - all residences and all businesses. Michael Cazes, Regional Engineer for the Louisiana State Department of Health and Hospitals, confirmed in his testimony that all residences and businesses served by the Ferriday water treatment plant were included in the "Advisory" and the "Notice".

The Class Representatives themselves, by the very nature of their home and work experiences, justify the categories or subclasses of persons included in the Class definition. Three of the Class Representatives (Martello, McKinney, and Roberts) lived in the Town when the "Advisory" and "Notice" started, and two of them (Martello and McKinney) did not move away at anytime during the

"Notice". They each claim to have suffered inconvenience, emotional distress, and stress because of water problems they claim they experienced at their homes. Mrs. McKinney and Mrs. Roberts claim to have incurred non-reimbursed personal expenses.

Three of the Class Representatives (Martello, Guidry, and Massey) operated a business in the Town and the "Advisory" and "Notice" started and continued operating their businesses throughout the entire time of the "Notice". They each claim to have suffered inconvenience, emotional distress, and stress because of the water problems they claim they experienced at their businesses. They also claim that they and their businesses either lost income or incurred extraordinary expenses as a result of the water problems they claim they experienced during the entire four (4) months duration of the "Boil Water Notice".

Four of the Class Representatives (Martello, Guidry, Massey, McKinney) worked in the Town throughout the entire time of the "Boil Water Notice". They each claim that they suffered inconvenience, emotional distress, and stress because of the water problems they claim they experienced at their businesses throughout

the entire four (4) months of the "Boil Water Notice."

Although none of the Class Representatives was a lessor of residential or commercial property supplied by the Ferriday water system during the time of the "Notice", the Court finds it reasonable, given the other evidence presented, to expect that if there are such persons, then they likely will have claims similar to those of the Class Representatives. If the Court is later presented with evidence indicating that this category should not be included, then the Court can always modify its definition to exclude this category. La. C.C.P. art. 592(A)(3)(c). The Court, therefore, includes this category in the Class definition.

The Court specifically excludes, however, from the Class definition any person who might be described as "transient" in the Town of Ferriday during the time of the "Boil Water Notice". For example, a truck driver who was passing through Ferriday while the "Notice" was in effect may have been temporarily inconvenienced by the requirements of the "Notice". The Court finds that the claims of such a person are too dissimilar from the claims of those who, like the Class Representatives, had to cope with the problems and

situations caused by the "Boil Water Notice" on a regular, daily basis. Although such a "transient" person may have the basis for a claim against one or more of the defendants for his temporary inconvenience, the Court finds that this type of claim lacks the common character required for it to be included in this Class. The Court is satisfied that the Class definition is objective and clear enough to put such a "transient" person on notice that any claim he may have is not included for adjudication with the claims of the Class, and that if he desires to bring a claim, he must do so in an individual suit.

The Court finds, therefore, that the Class, as defined herein, is defined objectively in terms of criterial that are relatively easy to ascertain. This definition will enable the Court to objectively determine whether a person or business meets the Class definition for the purpose of verifying the conclusiveness of any judgment on the merits that may be rendered in this case. La. C.C.P. art. 591(A)(5).

6. Article 591(B) Criteria

In addition to satisfying all five of the criteria under La. C.C.P. art 591(A), the plaintiff also must satisfy at least one of the criteria

or categories under La. C.C.P. art. 591(B). The Court finds that the testimony and evidence presented by the plaintiff satisfies this requirement.

A. Article 591(B)(1)(b)

The plaintiff asked the Court to certify this case as a Class Action either La. C.C.P. art. 591(B)(1)(b) or La. C.C.P. art 591(B)(3). Specifically, the plaintiff asked for a 591(B)(1)(b) class to be certified against the Town of Ferriday and Owen & White, Inc., with a 591(B)(3) class to be certified against USFilter Waste Water Group, Inc.

The article 591(B)(1)(b) class is commonly referred to as the "limited fund" class. In support of the request to certify the Class under article 591(B)(1)(b), the plaintiff presented evidence, all through oral testimony, on the subject of the financial assets and insurance coverages of the Town of Ferriday and Owen & White Inc. This testimony primarily was from former Mayor Odeal Montgomery for the Town, and from Eugene Owen for Owen & White, Inc. There were no financial records, insurance policies, or accounting documents presented regarding either of these

defendants.

However, because the Court finds that the evidence in support of certifying this case as to all three defendants under article 591(B)(3) is sufficient, there is no need for any further discussion of the 591(B)(1)(b) criteria.

B. Article 591(B)(3)

The Court finds that the evidence presented by the plaintiff satisfies the criteria for certification under La. C.C.P. art. 591(B)(3) as to all three defendants. The article 591(B)(3) class is commonly referred to as the "predominance and superiority" class.

Predominance:

The first part of the 591(B)(3) criteria requires the Court to find that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members". La. C.C.P. art. 591(B)(3).

The evidence presented at the Class Certification hearing satisfies the Court that the common issues of liability and fault raised by the Class against all three defendants predominate over the Class members' individual claims for damages. The Class Representatives'

testimony satisfies the Court that their claims for damages differ only by degree or amount, but they are all of the same common types and categories, predominately being claims of inconvenience, annoyance, and discomfort; mental and emotional distress and stress; non-reimbursed personal expenses; and also non-reimbursed business expenses. All of the witnesses testified that they know of no individuals who suffered any physical bodily injury, disease, or illness that was diagnosed to be the result of the four (4) month "Boil Water Notice".

As previously stated in these Reasons, the Court finds not only that the Class members' claims are of a common nature, but also that their claims about their water problems originate from the same common source - the Town of Ferriday's only water treatment plant. Therefore, if any defendant is found to be liable to just one Class member due to that defendant's role in causing or contributing to the Class member's water-related complaints, then the finding of liability as to that defendant should be binding on that defendant as to all the other similarly situated Class members, without the need for any other Class member to have a trial on the merits of those

same issues.

The Louisiana Supreme Court recognized more than 20 years ago in *Stevens v. Board of Trustees* that differences in the recoveries sought by individual Class members, differences in the particularities of their claims and circumstances, and specific variations that might ultimately lead to recoveries by some Class members and not by others did not obviate the "common character" of a suit based on the same factual course of conduct by the defendants and the same legal relationship between the defendants and the Class members. The *Stevens* Court explained that under such circumstances, whether the tortious conduct arises out of a single incident or a long-term course of conduct, common issues as to liability predominate. The predominance of common liability issues invokes the "functional and pragmatic factors" that should be taken into consideration by this Court in aid of its ultimate determination of whether "the class action will clearly be more useful than other available procedures for definitive determination of a common-based right..." *Stevens v. Board of Trustees*, 309 So.2d 144, 151 (La. 1975).

Superiority:

The second part of the 591(B)(3) criteria requires the Court to find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." La. C.C.P. art. 591(B)(3).

The Court finds that the Class Certification hearing itself, conducted for four (4) days, with all witnesses testifying live before the Court (for a total of approximately 30 hours of live testimony; none by deposition), demonstrates the procedural advantage of trying the Class members' common issues of liability and fault against all three defendants in one common trial, at one time. This is especially true since there was no expert testimony offered by any party at the Class Certification hearing on the cause of the Ferriday water problems or on the cause of the 1999 "Boil Water Notice". It is clear to the Court that any such expert testimony would be common to all Class members, and that trying the defendants' liability and fault in one common trial superior to the other available procedural methods of either mass joinder and consolidation, or repetitive individual trials.

It is clear to this Court that such multiple, subsequent trials

would require most, if not almost all, of the same testimony from the same witnesses and experts, using the same documents and exhibits. The Court finds, therefore, that managing this case as a Class Action is the superior method for achieving the goals of fairness and judicial efficiency. As a Class Action, the Court has the authority to order, *sua sponte,* separate trials of separate issues before separate juries. In all other cases except the Class Action, the consent of the parities is required. *See e.g.* La. C.C.P. arts. 1562, 1736. Louisiana jurisprudence makes note of this unique ability in affirming the use of the Class Action procedure for the determination of common liability issues in mass torts. *Adams v. CSX Railroads,* 615 So.2d 476, 483 (La. App. 4th Cir. 1993); *Dumas, supra,* 635 So.2d at 452. The ability of a district court to order such a trial without the stipulation or consent of the parties has been determined to be a significant factor in the superiority of class action management. *Id.*

Article 591(B)(3) Factors:

As a part of the predominance and superiority analysis, article 591(B)(3) lists six non-exclusive factors for this Court to consider:

Factor (a) suggests that certification is appropriate when the

Class members have not displayed an interest in individually controlling the prosecution or defense of separate actions. This District Court's records evidence that this is the only suit that has been filed, originally identifying only one plaintiff. There are now four (4) Class members who have stepped forward with the named plaintiff, Gloria Martello, and stated their desire and willingness to serve as Class Representatives. Four (4) Class Representatives (Martello, Guidry, McKinney, Roberts) testified that they will pursue their own claims individually if this case is not certified as a class action, but none of them has taken any action at this time to file their own individual suit. The Court finds that this criteria is satisfied.

Factor (b) suggests that certification is appropriate when there is no other litigation, or only a few suits are already under way by or against members of the Class and involving these same issues. As with factor (a), the District Court's records evidence that there is no suit pending or filed in any Court in any District on these same issues other than this one. The Court finds that this criteria is satisfied.

Factor (c) suggests that certification is appropriate when it is desirable to concentrate complex litigation in one forum or district.

The focal point of this litigation is the Ferriday water treatment plant and intake facility. These facilities are located in Concordia Parish, and serve a Class of persons that is predominantly located in Concordia Parish. Most of the witnesses in this case live or work in Concordia Parish. There has not been any challenge by the defendants to this District Court as the proper venue or forum for this litigation. The Court finds that this criteria is satisfied.

Factor (d) suggests that certification is appropriate when it is determined that directing the case as a Class Action will not present or create any irreconcilable management difficulties. This Court recognizes that a case of this type inevitably will create some management problems. Since it is this Court that must ultimately reconcile and solve these problems, this Court must decide how best to try the claims of these Class members.

The Court believes that it is capable of solving the management problems that this case may present, but the Court can avail itself of assistance, if needed, in the form of Court-appointed experts (La. C.C.P. arts. 191, 373), or a Court-appointed Special Master (La. R.S. 13:4165). If, however, the problems become too difficult to resolve,

Appendix E
Appendix C
Appendix D

this Court always has the discretion to alter or amend the Class definition, or decertify some or all of the Class. La. C.C.P. art. 592(A)(3)(c). In exercising this discretion, the Louisiana Supreme Court has held that, because of a Court's ability to review and/or modify its certification ruling at any time, "if an error is to be made in favor or and not against the maintenance of the class." *McCastle, supra*, 456 So.2d at 620; *Ellis v. Georgia-Pacific,* 550 So.2d 1310, 1318 (La. App. 1st Cir. 1989), *writ denied,* 559 So.2d 121(La. 1990); La. C.C.P. art. 592(A)(3)(c). The Court finds, therefore, that this criteria is satisfied.

Factor (e) suggests that certification is appropriate when it would be impractical or unlikely for the Class members to be able to pursue their claims but for the class action procedure. This factor is particularly important in cases such as this one, where the Court anticipates that many of the Class members may have claims that might be considered "negative value" claims. The policy of providing a meaningful opportunity for persons with low value claims to pursue a remedy is at the very core of the rationale behind the class action procedure. The United States Supreme Court has

even said that the most dominant reason for a Rule 23(b)(3)[3] class action is the vindication of the rights of groups of persons with negative value claims. *See Amchem Products, Inc. v. Windsor,* 117 S. Ct. 2231, 2246 (1997). The Court finds that this criteria is satisfied.

Factor (f) suggests that certification is appropriate when the relief being demanded, including the vindication of any implicated public policies or legal rights, justifies the costs and burdens of class litigation. As was mentioned earlier, if even one plaintiff filed an individual suit against these three defendants, because of the nature of the case, the issues involved, and the scientific nature of many of the facts, this case would be considered complex litigation.

Having five (5) Class Representatives litigate all of the common issues of liability and fault at one time, with the outcome having *res judicata* effect for more than 4,500 Class members, will save costs and streamline the litigation. The Court finds that the cost of trying

---

[3]Rule 23(b)(3) is the federal Rule of Civil Procedure upon which Louisiana's article 591(B)(3) class action is based, and the wording of the two statutes is identical. *See* Fed. R. Civ. P.3(b)(3); *cf.* La. C.C.P. art. 591(B)(3).

all of the common issues of liability and causation in one trial, with the Class represented by the five (5) Representatives herein appointed, sufficiently outweighs the prospect of trying these same issues repetitively. The Court finds that this criteria is satisfied.

The Court finds, therefore, that the criteria of La. C.C.P. art. 591(B)(3), which requires that the common issues must predominate over the individual ones, and which also requires that the class action procedure must be superior to other available procedural methods for managing and trying the claims, is satisfied in this case as to all three defendants.

7. Exception of No Cause of Action of the Town of Ferriday

The Town of Ferriday brought an Exception of No Cause of Action challenging the plaintiff's request for class certification.[4] The exception of no cause of action is recognized by Louisiana courts as

---

[4]The Town of Ferriday's Exception of No Cause of Action was filed in the early stages of the litigation, in the Town's Answer, as an exception of no right of action. At the Town's request, and by consent of the parties and with leave of Court, it was conformed at the beginning of the Class Certification hearing into the Exception of No Cause of Action. Neither Owen & White, Inc., nor USFilter Waster Water Group, Inc., filed an Exception challenging the plaintiff's request for class certification.

an appropriate procedure to use in challenging a motion for certification. *Stevens v. Board of Trustees,* 309 So. 2d 144, 152 (La. 1975). When the exception of no cause of action is used to oppose or challenge class certification, it is appropriate for the Court to consider evidence and testimony beyond the "four corners" of the Petition, even though evidence is not usually accepted or considered in deciding an exception of no cause of action. *Id. See also Feldheim v. SI-SIFH Corp.*, 97-875 at 10 (La. App. 5th Cir. 6/30/98); 715 So. 2d 168, 172.

The plaintiff timely requested the opportunity to present evidence and testimony in opposition to the Town's Exception of No Cause of Action, and in further support of the plaintiff's Motion for Certification. The Court granted both sides the opportunity to present evidence in support of their pleadings. The Town's Exception of No Cause of Action was taken under advisement, pending the presentation of evidence and testimony by both sides at the Class Certification hearing. The parties agreed that all the evidence presented at the Class Certification hearing would be applicable to the proponents and opponents of the Town's Exception of No Cause

of Action.

The Court can find no authority to suggest that the criteria upon which it must decide the Exception of No Cause of Action is different from that upon which it must decide the plaintiff's Motion for Certification. That is, the jurisprudence indicates that the basis for granting or denying a request for class certification is the same, regardless of whether the pleading being ruled upon is the plaintiff's Motion or a defendant's Exception. When the defendant is the proponent of an exception challenging a request for class certification, then the defendant bears the burden of proof on that exception. *See Stevens, supra, and Feldhiem, supra.*

Since the Court finds that the plaintiff has met and satisfied all of the article 591(A) requirements for certification, and has met and satisfied all of the article 591(A) requirements for certification, and has met and satisfied the article 591(B)(3) requirement for certification as to all three defendants, the Court finds that the Town of Ferriday has failed to meet the burden of proof on its Exception of No Cause of Action.

The Town of Ferriday's Exception of No Cause of Action,

therefore, is hereby **OVERRULED** for all the same Reasons for Judgment assigned herein.

CONCLUSION

The Court finds that the facts and circumstances of this case satisfy all of the statutory criteria for class certification under La. C.C.P. art. 591(A) and 591(B)(3) as the all three (3) defendants herein, the Town of Ferriday, Owen & White, Inc. and USFilter Waste Water Group, Inc.

Class Counsel shall be responsible for notifying the putative Class members of the pendency of this Class Action and of their rights as Class members to participate in the Class Action, or to exercise their statutory right to opt out of the Class Action Notice. The form, content, frequency, and method of publication of the Official Class Action Notice shall be submitted to the Court for prior review and approval.

Accordingly, the Court herby enters its Judgment consistent with the Reasons for Judgment and these findings assigned herein.

Vidalia, Louisiana, this 25th day of July, 2001.

HON. KATHY JOHNSON
DISTRICT JUDGE
7th Judicial District Court

Appendix E

Appendix C

Appendix D

Appendix E

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

01-1240

GLORIA B. MARTELLO

VERSUS

CITY OF FERRIDAY AND OWEN AND WHITE, INC.

Judgement rendered MARCH 2, 2002 Applications for rehearing may be filed within the delays allowed by La. Code Civ. P. art. 2166 or La. Code Crim, P. art 922.

****

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT, PARISH OF CONCORDIA, NO. 36358, THE HONORABLE KATHY JOHNSON, DISTRICT JUDGE, PRESIDING

****

NED E. DOUCET, JR.
CHIEF JUDGE

****

Court composed of Ned E. Doucet, Jr., Chief Judge, Billie Colombaro Woodard, and Elizabeth A. Pickett, Judges.

AFFIRMED.

Charles S. Norris, Jr.
8 N. Oak St.
Vidalia, LA 71373
ATTORNEY FOR THE CLASS OF PLAINTIFFS/APPELLEES
Gloria Martello, Class Representative

Appendix D

Steven B. Murray
Lisa S. Harang
Julie A. Jacobs
909 Poydras St., Ste 2550
New Orleans, LA 70115
ATTORNEYS FOR THE CLASS OF PLAINTIFFS/APPELLEES
Gloria Martello, Class Representative

Stacy C. Auzenne
P O Box 12394
Alexandria, LA 71315-2394
ATTORNEY FOR THE DEFENDANT/APPELLANT
The Town of Ferriday

Robert E. Kerrigan
Joseph L. McReynolds
Lisa C. Winters
755 Magazine St.
New Orleans, LA 70130
ATTORNEY FOR THE DEFENDANT/APPELLANT
U.S. Filter Wastewater Group, Inc.

John P. Wolff, III
Stephen R. Wilson
Nancy B. Gilbert
P.O. Box 1151
Baton Rouge, LA 70821
ATTORNEY FOR THE DEFENDANT/APPELLANT
Owen & White, Inc.

DOUCET, Chief Judge.

The Defendants, the Town of Ferriday (the Town), Owen & White, Inc. (O&W) and U.S. Filter Wastewater Group, Inc. (U.S. Filter), appeal the trial court's decision to certify this matter as a class action.

The following undisputed facts, have been taken from the trial court's reasons for judgment, although reordered for purposes of this opinion:

> At all relevant times, the Town of Ferriday supplied potable water to the residences and business of Ferriday and the adjacent unincorporated areas, including Red Gum and Lake St. John, and billed its water customers monthly for the water they used.
>
> The Town of Ferriday contracted with the Baton Rouge engineering firm of Owen & White, Inc., in October 1978 for the purpose of designing a new water treatment plant for the Town of Ferriday, and for the adjacent communities that are supplied by the Town's water treatment plant.
>
> . . . .
>
> Owen & White recommended that the Town of Ferriday build a new water treatment plant, and the Town accepted the recommendation.
>
> . . . .
>
> Owen & White recommended the use of Old River, also called Marengo Bend, as the source of the raw water for the new water

treatment plant, and the Town of Ferriday accepted the recommendation.

. . . .

In the Fall of 1982, Owen & White . . . recommended that the Town of Ferriday consider using, as the primary filtration component of its new water treatment plant, a packaged water treatment plant designed and manufactured by Neptune Microfloc (the corporate predecessor in interest to defendant US Filter Water Waste Group, Inc.).

. . . .

Based on the outcome of [a] "pilot water plant" study [conducted using the Neptune Microfloc equipment], Owen & White recommended that the Town of Ferriday accept its design for the new water treatment plant incorporating the Neptune Microfloc packaged water treatment plant, and the Town accepted the recommendation.

The new water treatment plant was constructed and began operating in December 1998. Since that time, it has been the only water treatment plant that supplies potable water to the residences and business of the Town of Ferriday and the adjacent unincorporated areas, including Red Gum and Lake St. John.

. . . .

Within six (6) months after the new water treatment plant began operating, the Ferriday water customers complained about the quality of the water being produced by the new plant.

The source of the customers' complaints was determined to be an excessively high level of manganese in the raw water of Marengo Bend.

The excessively high level of manganese in the water in Marengo Bend was not reported by Neptune Microfloc in its summary of May 1983 "pilot water plant" study.

. . . .

In August 1999, the Louisiana State Department of Health and Hospitals issued first "Boil Water Advisory" and several days later a "Boil Water Notice" for everyone who received their potable water from the Town of Ferriday's water treatment plant.

No one was excluded from the "Boil Water Advisory" or from the "Boil Water Notice". All residences and businesses that were supplied by the Town of Ferriday's water treatment plant were included.

The . . . "Boil Water Advisory" and "Notice" instructed everyone using the Town of Ferriday's water supply that before they could use the Town's water for drinking, cooking, washing hands, or bathing, it first had to be brought to a "rolling" boil for at least 15 minutes.

. . . .

The "Boil Water Notice" was lifted on . . . December 22, 1999, for all residences and businesses that were supplied by the Town of Ferriday's water treatment plant.

During the approximately four (4) months that the Ferriday water customers were under the "Boil Water Notice", the National Guard supplied potable water to the Town of Ferriday in tanker trucks. Residents could draw water from the trucks into jars, jugs, bottles, buckets, or any other type of container.

. . . .

In August 1999, just one (1) or two (2) days before the "Boil Water Advisory" was issued, the Ferriday water plant experienced a complete shut down, leaving all Ferriday Water

customers without any water for three (3) days.

As a result of the water problems, Gloria Martello filed a "Petition for Damages and for Class Certification," seeking to have the matter certified as a class action to be pursued on behalf of:

> All persons or entities who are customers of, who are served by, and/or who otherwise are or were dependent on the City of Ferriday for their water supply, and who claim that they suffered damage or loss as a result of the failure of the Ferriday Water Plant that began on or about August 20, 1999.

After a hearing, the trial court granted the Plaintiff's motion for class certification and overruled the Town's exception of no cause of action. In connection with this ruling, the court issued twenty-four pages of written reasons for judgment. The Defendants, the Town, O & W and U.S. Filter, appeal the trial court's ruling.

NO CAUSE /NO RIGHT OF ACTION

The Town asserts as error that the trial court erred in failing "to rule on the Town's Exception of No Right and No Cause of Action before certifying a class pursuant to *Graf v. Town of St. Gabriel*." Further, the Town, on the date of oral arguments herein, filed exceptions of no cause or right in this court.

We first note that the Town, as evidenced by the transcript and

admitted in its brief on appeal, agreed to convert its exception of no right of action to an exception of no cause of action. Therefore, we cannot say that the trial court erred in failing to consider the exception of no right of action. The court did rule on the exception of no cause of action and, in fact, denied that motion in the same judgment in which it granted class certification.

We note that the case of *Graf v. Town of St. Gabriel,* 97-2022, (La. App. 1 Cir. 11/6/98); 744 So.2d 1, *writ denied*, 99-633 (La. 4/23/99); 742 So.2d 888 does not stand for the principle that all exceptions must be heard prior to class certification. Rather, in *Graf* the court required that a challenge to class certification and maintenance of the matter as a class action be heard prior to hearing the case on the merits. We find no error on the part of the trial court in this case in hearing the exception at the class certification hearing.

An exception of no cause of action questions the legal sufficiency of the pleadings. *Steed v. St. Paul's United Methodist Church,* 31,521, 31,522 (La. App. 2 Cir. 2/24/99); 728 So.2d 931, *writ denied*, 99-877 (La. 5/7/99); 740 So.2d 1290. "On review, dismissal for no cause of action should only be sustained if well-

pleaded allegations of fact in the petition clearly show that, based on circumstances alleged, there is no remedy under any theory of law." *Lewis v. 38th Judicial Dist. Court,* 00-1204, 00-878, p.2 (La. App.3 Cir. 12/6/00); 795 So.2d.347, 349, *writ denied*, 00-1898, 00-2401 (La. 8/24/01); 795 So.2d 319, 795 So.2d 320. After reviewing the pleadings filed by the Plaintiff herein, we find that the pleadings adequately state a cause of action for damages as well as the requirements for a class action. Therefore, we find that the trial court correctly overruled the exception of no cause of action. We further overrule the exception of no cause of action filed in this court.

DISCRETIONARY ACT IMMUNITY

The Town further asserts that the Trial court should have dismissed Plaintiff's suit because the town is immune from strict liability for its discretionary acts under La.R.S. 9:2798.1. The Town reasserts this in its exception on no right of action filed in this court. The Town did plead this defense in its answer to the Plaintiff's petition. However, we find nothing of record which would lead us to believe that this defense was before the court at the hearing on the class certification. Nothing in the Town's exception or argument is

applicable to this defense. Finding that the question of discretionary act immunity was not before the trial court, we decline to consider it on appeal. The record does not contain sufficient evidence to allow us to rule on this defense. We find that this defense goes to the merits of the case and does not affect the propriety of the class certification.

U.S. FILTER PROFFER EVIDENCE

The Town assigned as error the trial court's refusal to allow U.S. Filter to proffer certain evidence, apparently an agreement between the Town's former attorney and O & W. The Town did not object to this ruling. Therefore, we would not normally review the Town's assignments of error and arguments of the Town we will review this assignment.

After reviewing the record however, we find we need not reach the question of whether the court was proper in refusing to accept the proffer, since we find that the evidence was properly excluded. The trial court ordered the parties to exchange witness and exhibits lists by January 2, 2002. The order specifically required that:

> Exhibit lists and/or any other evidence that any party intends to introduce during the certification hearing must be disclosed and presented to the opposing parties (unless already produced in

Appendix E
Appendix D

> discovery) by **January 2, 2001**. Exhibits or documents already produced in discovery must be listed by adequate description and/or by their Bates-stamped number. Copies of demonstrative exhibits that may be used at the hearing also must be produced.

Exhibits and lists were filed by all parties. This agreement was not specifically listed in any exhibit list, although the Town purported to list as exhibits anything produced by or in the possession of any other party, without any more specific identification as required by the trial court's order.

> The theory inherent in pretrial procedure is to avoid surprise and to allow orderly disposition of cases. The trial court is vested with much discretion in determining when a pretrial order should be modified. However, that discretion is necessarily controlled by the principle that it must be exercised to prevent substantial injustice to the parties who have relied on the pretrial rulings or agreements and structured the preparation and presentation of their case accordingly. *Day v. South Line Equipment Company,* 551 So.2d 774, 779-780 (La. App. 1st Cir.), *writ denied,* 553 So.2d 474 (La. 1989).

Theriot v. State Dept. of Wildlife & Fisheries, 94-1536, p. 5 (La. App. 1 Cir. 4/7/95); 661 So.2d 986, 989, *writ denied,* 95-1617 (La. 10/6/95); 662 So.2d 1041.

We find no error in the trial court's decision to exclude from evidence a document not found on any exhibit list.

JUDICIAL BIAS

The Defendants assert that the trial court's ruling in this matter should be set aside because the trial judge was biased in favor of the Plaintiff. The trial judge did recuse herself after certifying the class because her bailiff is a potential class member. However, the Defendants, in spite of citing several pre-hearing incidents which allegedly support the finding that the trial judge was biased, did not file a written motion to recuse prior to the hearing or prior to the rendition of judgment herein. Accordingly, we will not consider this assignment of error. *Woodland Ridge Ass'n v. Cangelosi,* 94-2604 (La. App. 1 Cir. 10/6/95); 671 So.2d. 508, 512.

EXPANSION OF THE PLEADINGS

The Defendants/Appellants argue that the Plaintiff limited her claim for class certification to a "limited fund" theory under La. Code Civ. P. art. 591(B)(1)(b) and that the trial court therefore erred in allowing the Plaintiff to expand the pleadings to argue for certification under La. Code Civ.P. art. 591(B)(3) in that common issues of liability and fault predominate over individual claims. After reviewing the record, we find that Plaintiff's original and amending petitions sufficiently plead commonality and predominance. Even if

the petitions did not so plead, the Defendants/Appellants made no objection to the introduction of evidence tending to support the finding that common issues of liability of fault predominate over individual claims.

> Unobjected to evidence of issues are not contained in the pleadings, which is admitted at trial, serves to enlarge the pleadings. Such evidence is "treated in all respects as if [it] had been raised by the pleading[s]." La. Code Civ.Proc.art. 1154; See also, *First National Bank of Abbeville v. Greene,*612 So.2d. 759 (La. App. 3d Cir. 1992) and *Herrell v. Herrell,* 594 So.2d 943 (La. App. 3d Cir. 1992).

Hopkins v. American Cyanamid Co., 95-1088 (La. 1/16/96); 666 So.2d 615, 623. Therefore, the trial judge did not err in certifying the class action based on commonality and predominance rather than on a limited fund theory.

EXPERT LEGAL TESTIMONY

Defendants/Appellants argue that since the trial court allowed expansion of the pleadings to allow evidence that common issues of liability and fault predominate over individual claims, the court should have allowed the testimony of its expert on class certification, Ben Hanchey, an attorney. The Plaintiff objected to Hanchey being used as an expert witness prior to the hearing on class certification.

The court ruled that Hanchey would not be allowed to testify and this court denied the Defendants' application for writs in this regard.

After reviewing the record, and Hanchey's deposition which was proffered by the Defendants/Appellants, we find that Hanchey's testimony consists of "legal opinions and conclusions of law." *Wilson v. Wilson,* 542 So.2d 568, 573 (La. App. 1 Cir. 1989). His testimony contains nothing which could not be more properly presented to the court via argument or memoranda.

> The testimony of an expert, with the attendant right to express opinions and conclusions, is proper for the purpose of assisting the court only in those fields in which the court lacks sufficient knowledge to enable it to come to a proper conclusion without such assistance. *Clesi, Inc. v. Quaglino,* 137 So.2d. 500 (La. App. 4th Cir. 1962). The domestic law testimony of an expert is not proper, as distinguished from foreign law testimony, on the theory that the court itself is the expert on domestic law.

Id.

Accordingly, we find no error in the trial court's decision to exclude Hanchey's testimony.

CLASS CERTIFICATION

The various Defendants/Appellants argue that the trial court erred in certifying the class because the Plaintiff failed to establish numerosity and typicality, because individual issues predominate

Appendix E
Appendix D

over class issues.

Louisiana Code of Civil Procedure Articles 591 and 592 describe the requirements for a class action:

(1) A class so numerous that joinder is not practical;

(2) The joinder of at least one member of the class who is able to provide adequate representation for the absent members; and

(3) A common character among the rights of the representative and the absent class members.

Pellerin v. Louisiana Health Serv. & Indem. Co., 460 So.2d 93 (La. App. 3 Cir. 1984). There is no set number of participants needed to satisfy the "numerosity" requirement. *Ducote v. City of Alexandria,* 95-1197 (La. App. 3 Cir. 3/6/96); 670 So.2d 1378. Courts examine the facts and circumstances of each case to determine whether the class is so numerous that it makes joinder impracticable. *Id*. The trial court found that the persons constituting the class were too numerous to be joined since there were at least 114 potential class members in Natchitoches Parish alone and that Schwab stipulated to the same. This large number of potential class members surely produces too many plaintiffs to join in a manner conducive to judicial economy.

The requirements of "adequate representation" is satisfied when the claims of the class representatives are typical or a cross section of the claims of all of the members in the class. *Dumas,* 635 So.2d 446. The trial court found that Robert C. Thomas and Robert M. Kahn were adequate class representatives because their claims were typical of those of all class members. Since their claims are consistent with those of the overall class, Mr. Thomas and Dr. Kahn will provide fair and adequate representation for all of the class members.

The "common character" requirement only allows class actions

to be certified in cases where it would achieve economy of time, effort, expense, and provide for uniform outcomes for similarly situated plaintiffs. *McCastle v. Rollins Envtl. Services,* 456 So.2d 612, 616 (La. 1984). The district court found no material difference between the claims of the class representatives and those of the absent class members. It noted the absence of differences which would prevent class certification and stated the court would consider the use of case management techniques to handle any material differences which may later arise. Given the evidence provided at this time, creating a class of individuals who have similar rights will achieve more efficient outcomes than allowing separate actions to proceed.

A trial court has broad discretion to certify a class through its analysis of the facts and circumstances before it, *Ducote v. City of Alexandria,* 670 So.2d 1378. The Trial court's decision cannot be overturned absent manifest error. *Spitzfaden*, 619 So.2d 795. Until the decision on the merits is rendered, the court may alter or amend its decision to certify a class. La. Code Civ.P. art. 593.1(B). Based on the evidence that is currently in the record, the trial court did not abuse its board discretion to certify the class.

Thomas v. Charles Schwab & Co. Inc., 95-1405, pp. 6-8 (La. App. 3 Cir. 9/25/96); 683 So.2d 734, 738-39, *writ denied,* 97-0009, 96-2579 (La.1/24/97); 686 So.2d 859; 686 So.2d 858.

In this case the trial court adequately explained her reasons for certifying the class, in extensive reasons for judgment, pertinent parts of which have been attached hereto as an appendix (footnotes omitted). After reviewing these reasons, and the record upon which they are based, we find her analysis of the facts and circumstance to

be correct. Finding no manifest error, we affirm the decision of the trial court to certify the class as laid out in her reasons for judgment.

CONCLUSION

For these reasons, we affirm the judgment of the trial court. Costs of this appeal are assessed equally to the Defendants/Appellants.

AFFIRMED.

Appendix E

Appendix D

APPENDIX

Conclusions of Law

1. Numerosity

The testimony from Water Plant Superintendent William McKeel and former Mayor Odeal Montgomery establishes that at all relevant times there were approximately 4,500 residents in the Town of Ferriday who received the water at their homes and businesses from the Town of Ferriday's water treatment plant. Additionally, there are residents of the adjacent areas of Red Gum (such as Mildred McKinney) and Lake St. John who received their water from the Town of Ferriday's water treatment plant. This number of persons, who claim that they were similarly affected by the 1999 water plant failure and the "Boil Water Notice" is sufficient to satisfy the "numerosity" requirement. La. C.C.P. art. 591(A)(1).

A class action is appropriate whenever the interested parties appear to be so numerous that separate suits would unduly burden the courts, and a class action would "clearly be more useful and judicially expedient than the other available procedure. "*Cotton v. Gaylord Container*, 96-1958 at 14 (La. App. 1st Cir. 3/37/97); 691

So.2d 760, 769, *writs denied*, 97-0800 and 0830 (La. 4/8/97); 693 So.2d 147. Our Courts and our laws do not require a minimum number of persons, nor do they set a maximum number. The determination of whether this requirement has been fulfilled depends on the facts and circumstances of each individual case. *Cotton, supra,* 96-1958 at 14,691 So.2d at 768; *Dumas v. Angus Chemical Co.*, 25,632 at 6-7 (La. App. 2d Cir. 3/30/94); 635 So.2d 446, 450.

The Court finds that the testimony establishes that the facts and circumstances of this case, and the number of persons and businesses (at least 4,500) who claim that they were similarly affected by the Town of Ferriday's water problems in 1999, therefore, is sufficient to satisfy the "numerosity" requirement. La. C.C.P. art. 591(A)(1).

2. Commonality

The Court heard testimony from witnesses whose homes are supplied by the Town of Ferriday's water treatment plant (Gloria Martello, Christine Roberts, Mildred McKinney), or whose businesses are supplied by the Town of Ferriday's water treatment plant (Gloria Martello, Shelby Guidry, Tommy Massey) or who work at a business supplied by the Town of Ferriday's water treatment

plant (Gloria Martello, Shelby Guidry, Tommy Massey, Mildred McKinney).

All of these witnesses testified about the problems and complaints they had with the water produced by the Town of Ferriday's water treatment plant, and with the problems they claim they experienced during the four (4) months of the "Boil Water Notice". The witnesses testified about the problems they had with cooking, drinking, bathing, and doing laundry. Odeal Montgomery (who was the Mayor when the Town was placed under the "Boil Water Notice" in August 1999), described these four (4) months as "perilous times". The Court finds all of these witnesses to be credible and forthright in their testimony.

At this time, the Court is not asked to decide whether these claims are accurate, valid, or compensable. Nor is the Court asked at this time to decide who or what caused or contributed to any of the Town of Ferriday's water problems, the August 1999 "shut down", or the August-December 1999 "Boil Water Notice". At this time, the Court is only required to determine whether these claims have a common character such that they satisfy the statutory requirement of

"commonality". La. C.C.P. art 591(A)(2).

All of the witnesses described having the same types of problems during the "Boil Water Notice". They testified about the same types of inconvenience, the same types of worries, the same type of stress, the same types of non-reimbursed personal expenses, and the same types of non-reimbursed business expenses.

Mr. Michael Cazes, an official with the Regional Office of Louisiana State Department of Health and Hospitals, testified that the "Boil Water Notice" started on the same day for everyone, ended on the same day for everyone, and that everyone was under the same set of instructions about using the water for the entire period of time that the "Boil Water Notice" was in effect. Mr. Cazes testified that even though the water treatment plant was capable of producing water after the initial 3-day "shut down" the water was not potable (drinkable without first boiling it) until December 22, 1999, when the State lifted the "Boil Water Notice".

Based on all of this testimony, the Court finds that the only differences between the claims of these witnesses are differences of degree and amount. The nature of their claims is so similar as to be

almost identical. In addition to the common nature of the witnesses' claims, their testimony satisfies the Court that the claims about their water problems originate from the same common source - the Town of Ferriday's water treatment plant. Therefore, if any defendant is found to be liable to just one Class member due to that defendant's role in causing or contributing to the Class member's water-related complaints, then the finding of liability should be binding on that defendant as to all the other similarly situated Class members, without the need for every other Class member to have a trial on those same issues.

The Court understands and recognizes that there will be differences in the Class members' claims in the degree and amount of damages they seek, but the nature of their claims is common to the entire Class. Some may only have claims for lost personal expenses, whereas some may only have claims for lost business expenses, but the Court considers these to be differences of degree or amount. These individual differences in the exact type or amount of damages does not preclude or defeat class certification. *McCastle v. Rollins Environmental Services of Louisiana, Inc.*, 456 So.2d 612, 616 (La.

1984); *Livingston Parish Police Jury v. Acadiana Shipyards,* 598 So.2d 1177, 1183 (La. App. 1st Cir.), *writ denied,* 605 So. 2d 1122 (La. 1992); *Bartlett v. Browning-Ferris Industries Chemical Services, Inc.*, 99-494 (La. 11/12/99); 759 So.2d 755. It has been established that the existence of issues particular to individual members of the class does not defeat commonality. *McCastle, supra,* 456 So.2d at 620.

The Court finds that the claims of the Class members have a sufficient common character and are derived from a common source. Their claims against the defendants are directed at the common nature of the defendants' conduct. The Court finds, therefore, that the "commonality" requirement is satisfied in this case. La. C.C.P. art. 591(A)(2).

3. Typicality

The "typicality" criteria is a relatively new statutory requirement for certification. Louisiana state courts, however, judicially adopted this requirement years ago, so it is not new to Louisiana class action jurisprudence. *See e.g. Adams v. CSX Railroads,* 615 So.2d 476, 482 (La. App. 4th Cir. 1993); *Dumas v. Angus Chemical Co.*, 25,632 at 6

(La. App. 2d Cir. 3/30/94); 635 So.2d 446, 450.

This criteria combines elements of commonality and adequacy by requiring that the Class Representatives assert claims that are typical or a cross-section of those asserted or raised by the rest of the members of the Class. This criteria also includes a consideration of the Class Representatives' claims to determine whether any are adverse to or substantially different in general type from those asserted by the rest of the Class.

In every class action, except those primarily seeking injunctive relief, there are almost always differences between and among members of the Class in the amount and degree of damages each claims to have suffered. But these differences in degree or amount are not typicality factors. Typicality is only concerned with the types of claims being asserted, not with the degree or amount of damages being requested. *See Billieson v. City of New Orleans,* 98-1232 at 17 (La. App. 4" Cir. 3/3/99); 729 So.2d 146, 157, *writ denied*, 99-0946 (La. 10/29/99); 749 So.2d 644.

Each of the Class Representatives testified about the type and nature of their claims:

Mrs. Martello testified that she experienced mental and emotional distress and stress; non-reimbursed business expenses; loss of business income; annoyance, discomfort, and inconvenience. Mr. Massey testified that he experienced mental and emotional distress and stress; non-reimbursed business and personal expenses; and annoyance, discomfort, and inconvenience. Mrs. Guidry testified that she experienced mental and emotional distress and stress; non-reimbursed business expenses; loss of business income; annoyance, discomfort, and inconvenience; and property damage. Mrs. Roberts testified that she experienced mental and emotional distress and stress; non-reimbursed personal expenses; annoyance, discomfort, and inconvenience. Mrs. McKinney testified that she experienced mental and emotional distress and stress; non-reimbursed personal expenses; annoyance, discomfort, and inconvenience; and fear of disease or illness for her family.

Each of the Class Representatives also testified about their residential or business relationship with the Town of Ferriday during the "Boil Water Notice":

Mrs. Martello testified that she lives in the Town, owns and

operates a business in the Town, works in the Town, and owns property in the Town. The water to her home and her business is supplied by the Town of Ferriday water treatment plant. Mrs. Guidry testified that she owns and operates a business and property in the Town and works in the Town. The water to her business is supplied by the Town of Ferriday water treatment plant. Mr. Massey testified that he operates a business in the Town and works in the Town. The water to the business he operates is supplied by the Town of Ferriday water treatment plant. Mrs. Roberts lived in the Town and still owns property in the Town. The water to her home in Ferriday is supplied by the Town of Ferriday water treatment plant. Mrs. McKinney lives and owns property in the Red Gum area of Ferriday, and works in the Town. The water to her home and the business where she works is supplied by the Town of Ferriday water treatment plant.

The Court finds that the testimony of these Class Representatives about the nature and type of their claims was direct and creditable. It was not emotional, exaggerated or contrived. They each genuinely expressed, in their own words, what they experienced during the "Boil Water Notice" and why they believe they should be

compensated. Whereas the Court reaches no conclusions at this time about the merits of their claims, their testimony about the nature and type of their claims persuades the Court that their claims are, in fact, typical of all persons who were living in, working in, owning property in, and/or owning and operating a business in the Town of Ferriday during the "Boil Water Notice".

The Court finds that individually and as a group the claims of these Class Representatives are typical of the claims of the Class members because they are similar in nature, they arise from the same alleged course of each defendant's conduct, and they are all based on the same legal theories under Louisiana law. The Class Representatives demonstrated to the Court during their testimony that they are capable and prepared to represent the interests of the absent Class members.

The Court further finds that the Class Representatives are typical within the meaning of that term in Louisiana class action jurisprudence because they each present claims that are a cross-section of the Class they seek to represent. Louisiana's "adequacy of representation" criteria "requires that the claims of the class

representatives be a cross-section of, or typical of, the claims of all class members." See *e.g. Dumas, supra,* 635 So.2d at 450; *Livingston Parish, supra,* 598 So.2d at 1177; *Lailhengue v. Mobil Oil Co.,* 94-2114 a 5-6 (La. App. 4th Cir. 6/7/95); 657 So.2d 542, 546; *Ford v. Murphy Oil,* 96-2913 at 4 (La. 9/9/97); 703 so.2d 542, 544. Louisiana, however, does not require that either the Class Representatives or their claims be identical to all the Class members or to any Class members within the Class. *Id.*

The Court finds that the five (5) appointed Class Representatives present claims that are typical of those likely to be presented by the absent members of the Class certified herein. Their claims are a cross-section of the claims of the Class members, and are derived from the same common source. Their claims against the defendants are typical of all claims directed at the common nature of the defendants' conduct. The Court finds, therefore, that the "typicality" requirement is satisfied in this case. La. C.C.P. art. 591(A)(3).

4. Adequacy of Representation

The evidence that was presented at the Class Certification hearing satisfies the Court that the claims of the five (5) persons now

Appendix E
Appendix D

appointed to serve as Class Representatives and the claims of the absent Class members (defined above) have a common character that predominates over their individual differences, and that the claims of these five (5) Class Representatives are typical of the claims of the members of the Class identified herein. The Court finds that none of the Class Representatives has any personal or financial interest in the outcome of this Class Action litigation that is adverse to the interests of the absent members of the Class, and also that each of them has demonstrated that they are able and willing to serve in the capacity of a Class Representative. La. C.C.P. art. 591(A)(4).

Louisiana requires class actions to be litigated by and through one or more adequate representatives who participate on behalf of and for the absent class members. Satisfying this element requires the proposed Class Representatives to establish that their claims are "a cross-section of, or typical of, the claims of all class members." *Andry v. Murphy Oil, U.S.A. Inc.*, 97-0793 at 6 (La. App. 4th Cir. 4/1/98); 710 So.2d 1126, 1130.

During the hearing, each proposed Class Representative testified before the Court about their personal and family background, their

work background, their experiences with the Town of Ferriday's water, and of the hardships and problems they claim that they each suffered during the 1999 "Boil Water Notice". Each proposed Class Representative was questioned about the nature of their claims, their understanding of the nature of a class action, and their understanding of the role of a Class Representative. The Court finds that each of these witnesses were creditable, candid and forthright in their answers, and that they each posses a good understanding of their role in this case.

The Court also finds that the following attorneys have the necessary skill, background, expertise, experience, and absence of any conflict of interest, in order to be designated as a Class Counsel, and are hereby appointed as such: 1. Charles S. Norris, Jr. Liaison Counsel for the Class, of Vidalia, Louisiana; and 2. Stephen B. Murray; 3. Linda S. Harang; and 4. Julie A. Jacobs, all of the Murray Law Firm, of New Orleans, Louisiana.

Each of these counsel submitted an Affidavit to the Court, with a curriculum vitae outlining their experience in litigation in general, and particularly in class action litigation. These Affidavits attest to

their desire to be staunch advocates for the Class, and that they are financially able to fund this litigation for the Class. Their Affidavits attest that they are each free of any conflict of interest. Each counsel also attached a current Certificate of Good Standing from the Louisiana Supreme Court as further evidence of their fitness to serve a Class Counsel. No evidence was introduced at the hearing to contradict or challenge any of the information in these Affidavits or curriculum vitae. Additionally, by their presentation to the Court of their witnesses and evidence during the Class Certification hearing, these counsel have demonstrated to the Court that they are able to adequately and ably represent the Class.

The Court finds, therefore, that as to five (5) Class members now appointed to serve as Class Representatives, and as to the four (4) attorneys appointed to serve as Class Counsel, the "adequacy of representation" requirement is satisfied. La. C.C.P. art. 591(A)(4).

5. Adequate, Objective Class Definition

The evidence in the record supports the Court's decision to define the Class as:

All persons, businesses, or entities who belong to at least one of

the following five groups, and who, as a direct result of receiving their water from the Town of Ferriday Water Plant between August 20, 1999 and December 22, 1999, have at least one of the following claims: mental and emotional distress; non-reimbursed personal expenses; non-reimbursed business expenses; loss of personal income; loss of business income; annoyance, discomfort, and inconvenience; personal injury including fear of contraction of disease or illness; or property damage.

1. Residents of the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and who received their water supply to that residence from the Town of Ferriday Water Plant;

2. Owners and/or operators of businesses in the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and that received their water supply to that business from the Town of Ferriday Water Plant; and

3. Lessors of residential and/or commercial property located in the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and that received their water supply to that property from the Town of Ferriday Water Plant; and

4. Employees of businesses in the Town of Ferriday or any adjacent community at any time between August 20, 1999 and December 22, 1999, and that received their water supply at their place of employment from the Town of Ferriday Water Plant.

5. School students or patients in health care facilities who were required to be in the Town of Ferriday at any time between August 20, 1999 and December 22, 1999, and

that received their water supply at their school or health care facility from the Town of Ferriday Water Plant.

Several witnesses testified about the people, residences, and businesses that were included in the State's "Boil Water Advisory" and "Notice". William McKeel, who was the operator of the Ferriday water treatment plant at the time of the "Notice" testified that all residences and businesses supplied by the Ferriday water treatment plant were included in the "Notice". Then-Mayor Odeal Montgomery testified that when she received the information from the State, everyone was included - all residences and businesses. Michael Cazes, Regional Engineer for the Louisiana State Department of Health and Hospitals, confirmed in his testimony that all residences and businesses served by the Ferriday water treatment plant were included in the "Advisory" and the "Notice".

The Class Representatives themselves, by the very nature of their home and work experiences, justify the categories or subclasses of persons included in the Class definition. Three of the Class Representatives (Martello, McKinney, and Roberts) lived in the Town when the "Advisory" and "Notice" started, and two of them

(Martello and McKinney) did not move away at any time during the "Notice". They each claim to have suffered inconvenience, emotional distress, and stress because of the water problems they claim they experienced at their homes. Mrs. McKinney and Mrs. Roberts claim to have incurred non-reimbursed personal expenses.

Three of the Class Representatives (Martello, Guidry, and Massey) operated a business in the Town when the "Advisory" and "Notice" started and continued operating their businesses throughout the entire time of the "Notice". They each claim to have suffered inconvenience, emotional distress, and stress because of the water problems they claim they experienced at their businesses. They also claim that they and their businesses either lost income or incurred extraordinary expenses as a result of the water problems they claim they experienced during the entire four (4) months duration of the "Boil Water Notice".

Four of the Class Representatives (Martello, Guidry, Massey, McKinney) worked in the Town throughout the entire time of the "Boil Water Notice". They each claim that they suffered inconvenience, emotional distress, and stress because of the water

problems they claim they experienced at their businesses throughout the entire four (4) months of the "Boil water Notice".

Although none of the Class Representatives was a lessor of residential or commercial property supplied by the Ferriday water system during the time of the "Notice", the Court finds it reasonable, given the other evidence presented, to expect that if there are such persons, then they likely will have claims similar to those of the Class Representatives. If the Court is later presented with evidence indicating that this category should not be included, then the Court can always modify its definition to exclude this category. La. C.C.P. art. 592(A)(3)(c). The Court, therefore, includes this category in the Class definition.

The Court also finds it reasonable to include in the Class school students and patients in health care facilities who were required to be in the Town of Ferriday during the "Boil Water Notice". Given the evidence presented, the Court expects that if there are such persons, then they likely will have claims similar to those of the Class Representatives. If the Court is later presented with evidence indicating that this category should not be included, then the Court

can always modify its definition to exclude this category. La.C.C.P. art. 592(A)(3)(c). The Court, therefore, includes this category in the Class definition.

The Court specifically excludes, however, from the Class definition any person who might be described as "transient" in the Town of Ferriday during the time of the "Boil Water Notice". For example, a truck driver who was passing through Ferriday while the "Notice" was in effect may have been temporarily inconvenienced by the requirements of the "Notice". The Court finds that the claims of such a person are too dissimilar from the claims of those who, like the Class Representatives, had to cope with the problems and situations caused by the "Boil Water Notice" on a regular, daily basis. Although such a "transient" person may have the basis for a claim against one or more of the defendants for his temporary inconvenience, the Court finds that this type of claim lacks the common character required for it to be included in this Class. The Court is satisfied that the Class definition is objective and clear enough to put such a "transient" person on notice that any claim he may have is not included for adjudication with the claims of the

Class, and that if he desires to bring a claim, he must do so in an individual suit.

The Court finds, therefore, that the Class, as defined herein, is defined objectively in terms of criteria that are relatively easy to ascertain. This definition will enable the Court to objectively determine whether a person or business meets the Class definition for the purpose of verifying the conclusiveness of any judgment on the merits that may be rendered in this case. La. C.C.P. art. 591(A)(5).

6. Article 591(B) Criteria

In addition to satisfying all five of the criteria under La. C.C.P. art. 591(A), the plaintiffs also must satisfy at least one of the criteria or categories under La. C.C.P. art. 591(B). The Court finds that the testimony and evidence presented by the plaintiff satisfies this requirement.

A. Article 591(B)(1)(b)

The plaintiff asked the Court to certify this case as a Class Action under either La. C.C.P. art. 591(B)(1)(b) or La. C.C.P. art. 591(B)(3). Specifically, the plaintiff asked for a 591(B)(1)(b) class to be certified against the Town of Ferriday and Owen & White, Inc.

with a 591(B)(3) class to be certified against USFilter Waste Water Group, Inc.

The article 591(B)(1)(b) class is commonly referred to as the "limited fund" class. In support of the request to certify the Class under article 591(B)(1)(b), the plaintiff presented evidence, all through oral testimony, on the subject of the financial assets and insurance coverages of the Town of Ferriday and Owen & White, Inc. This testimony primarily was from Mayor Odeal Montgomery for the Town, and from Eugene Owen for Owen & White, Inc. There was no financial records, insurance policies, or accounting documents presented regarding either of these defendants.

However, because the Court finds that the evidence in support of certifying this case to all three defendants under article 591(B)(3) is sufficient, there is no need for any further discussion of the 591(B)(1)(b) criteria.

B. Article 591(B)(3)

The Court finds that the evidence presented by the plaintiff satisfies the criteria for certification under La. C.C.P. art. 591(B)(3) as to all three defendants. The article 591(B)(3) class is commonly

Appendix E
Appendix D

referred to as the "predominance and superiority" class.

Predominance:

The first part of the 591(B)(3) criteria requires the Court to find that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members". La. C.C.P. art. 591(B)(3).

The evidence presented at the Class Certification hearing satisfies the Court that the common issues of liability and fault raised by the Class against all three defendants predominate over the Class members' individual claims for damages. The Class Representatives' testimony satisfies the Court that their claims for damages differ only by degree or amount, but they are all of the same common types and categories, predominantly being claims of inconvenience, annoyance, and discomfort; mental and emotional distress and stress; non-reimbursed personal expenses; and also non-reimbursed business expenses. All of the witnesses testified that they know of no individuals who suffered any physical bodily injury, disease, or illness that was diagnosed to be the result of the four (4) month "Boil Water Notice."

As previously stated in these Reasons, the Court finds not only that the Class member's claims are of a common nature, but also that their claims about their water problems originate from the same common source - the Town of Ferriday's only water treatment plant. Therefore, if any defendant is found to be liable to just one Class member due to that defendant's role in causing or contributing to the Class member's water-related complaints, then the finding of liability as to that defendant should be binding on that defendant to all the other similarly situated Class members, without the need for any other Class member to have a trial on the merits of those same issues.

The Louisiana Supreme Court recognized more than 20 years ago in *Stevens v. Board of Trustees* that differences in the recoveries sought by individual Class members, differences in the particularities of their claims and circumstances, and specific variations that might ultimately lead to recoveries by some Class members and not by others did not obviate the "common character" of a suit based on the same factual course of conduct by the defendants and the same legal relationship between the defendants and the Class members. The

Stevens Court explained that under such circumstances, whether the tortious conduct arises out of a single incident or a long term course of conduct, common issues as to liability predominate. The predominance of common liability issues invokes the "functional and pragmatic factors" that should be taken into consideration by this Court in aid of its ultimate determination of whether "the class action will clearly be more useful than other available procedures for definitive determination of a common-based right. . . . ."*Stevens v. Board of Trustees*, 309 So.2d 144, 151 (La. 1975).

Superiority:

The second part of the 591(B)(3) criteria requires the Court to find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." La. C.C.P. art. 591(B)(3).

The Court finds that the Class Certification hearing itself, conducted for four (4) days, with all witnesses testifying live before the Court (for a total of approximately 30 hours of live testimony; none by deposition), demonstrates the procedural advantage of trying the Class members' common issues of liability and fault against all

three defendants in one common trial, at one time. This is especially true since there was no expert testimony offered by any party at the Class Certification hearing on the cause of the Ferriday water problems or on the cause of the 1999 "Boil Water Notice". It is clear to the Court that any such expert testimony would be common to all Class members, and that trying the defendants' liability and fault in one common trial is superior to the other available procedural methods of either mass joinder and consolidation, or repetitive individual trials.

It is clear to this Court that such multiple, subsequent trials would require most, if not almost all, of the same testimony from the same witnesses and experts, using the same documents and exhibits. The Court finds, therefore, that managing this case as a Class Action is the superior method of achieving the goals of fairness and judicial efficiency. As a Class Action, the Court has the authority to order, *sua sponte*, separate trials of separate issues before separate juries. In all other cases except the Class Action, the consent of the parties is required. *See e.g.* La. C.C.P. arts. 1562, 1736. Louisiana jurisprudence makes note of this unique ability in affirming the use

of the Class Action procedure for the determination of common liability issues in mass torts. *Adams v. CSX Railroads,* 615 So.2d 476, 483 (La. App. 4th Cir. 1993); *Dumas, supra,* 635 So.2d at 452. The ability of a district court to order such a trial without the stipulation or consent of the parties has been determined to be a significant factor in the superiority of class action management. Id.

Article 591(B)(3) Factors:

As a part of the predominance and superiority analysis, article 591(B)(3) lists six non-exclusive factors for this Court to consider:

Factor (a) suggests that certification is appropriate when the Class members have not displayed an interest in individually controlling the prosecution or defense of separate actions. This District Court's records evidence that this is the only suit that has been filed, originally identifying only one plaintiff. There are now four (4) more Class members who have stepped forward with the named plaintiff, Gloria Martello, and stated their desire and willingness to serve as Class Representatives. Four (4) Class Representatives (Martello, Guidry, McKinney, Roberts) testified that they will pursue their own claims individually if this case is not

certified as a class action, but none of them has taken any action at this time to file their own individual suit. The Court finds that this criteria is satisfied.

Factor (b) suggests that certification is appropriate when there is no other litigation, or only a few suits are already under way by or against members of the Class and involving these same issues. As with factor (a), the District Court's records evidence that there is no suit pending or filed in any Court in any District on these same issues other than this one. The Court finds that this criteria is satisfied.

Factor (c) suggests that certification is appropriate when it is desirable to concentrate complex litigation is one forum or district. The focal point of this litigation is the Ferriday water treatment plant and intake facility. These facilities are located in Concordia Parish, and serve a Class of persons that is predominately located in Concordia Parish. Most of the witnesses in this case live or work in Concordia Parish. There has not been any challenge by the defendants to this District Court as the proper venue or forum for this litigation. The Court finds that this criteria is satisfied.

Factor (d) suggests that certification is appropriate when it is

determined that directing the case as a Class Action will not present or create any irreconcilable management difficulties. This Court recognizes that a case of this type inevitably will create some management problems. Since it is this Court that must ultimately reconcile and solve these problems, this Court must decide how best to try the claims of these Class members.

The Court believes that it is capable of solving the management problems that this case may present, but the Court can avail itself of assistance, if needed, in the form of Court-appointed experts (La. C.C.P. arts. 192, 373), or a Court-appointed Special Master (La. R.S. 13:4165). If however, the problems become too difficult to resolve, this Court always has the discretion to alter or amend the Class definition, or decertify some or all of the Class. La. C.C.P. art. 592(A)(3)(c). In exercising this discretion, the Louisiana Supreme Court has held that, because of a Court's ability to review and/or modify its certification ruling at any time, "if an error is to be made, it should be made in favor of and not against the maintenance of the class." *McCastle, supra,* 456 So.2d at 620; *Ellis v. Georgia-Pacific,* 550 So.2d 1310, 1318 (La. App. 1st Cir. 1989), *writ denied*, 559

So.2d 121 (La. 1990); La. C.C.P. art. 592(A)(3)(c). The Court finds, therefore, that this criteria is satisfied.

Factor (e) suggests that certification is appropriate when it would be impractical or unlikely for the Class members to be able to pursue their claims but for the class action procedure. This factor is particularly important in cases such as this one, where the Court anticipates that many of the Class members may have claims that might be considered "negative value" claims. The policy of providing a meaningful opportunity for persons with low value claims to pursue a remedy is at the very core of the rationale behind the class action procedure. The United States Supreme Court has even said that the most dominant reason for a Rule 23(b)(3)3 class action is the vindication of the rights of groups of persons with negative value claims. See *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2246 (1997). The Court finds that this criteria is satisfied.

Factor (f) suggests that certification is appropriate when the relief being demanded, including the vindication of any implicated public policies or legal rights, justifies the costs and burdens of class

Appendix E
Appendix D

litigation. As was mentioned earlier, it even one plaintiff filed an individual suit against these three defendants, because of the nature of the case, the issues involved, and the scientific nature of many of the facts, this case would be considered complex litigation.

Having five (5) Class Representatives litigate all of the common issues of liability and fault at one time, with the outcome having *res judicata* effect for more than 4,500 Class members, will save costs and streamline the litigation. The Court finds that the cost of trying all of the common issues of liability and causation in one trial, with the Class represented by the five (5) Representatives herein appointed, sufficiently outweighs the prospect of trying these same issues repetitively. The Court finds that this criteria is satisfied.

The Court finds, therefore, that the criteria of La. C.C.P. art. 591(B)(3), which requires that the common issues must predominate over the individual ones, and which also requires that the class action procedure must be superior to other available procedural methods for managing and trying the claims, is satisfied in this case as to all three defendants.

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT
P O Box 16577
Lake Charles, LA 70616
(337) 433-9403

Anna Kay Brakenridge
Attorney at Law
1112 North Second Street
Ferriday, LA 71334

Jon Keith Guice
Hammond & Sills
1103 Royal Street
Monroe, LA 71201

Randall Brian Keiser
Keiser & Auzenne
P O Box 12394
Alexandria, LA 71315-2394

Judgement on Rehearing Rendered
May 1, 2002

REHEARING ACTION: May 1, 2002

Docket Number: 01 01240-CA

GLORIA MARTELLO
VERSUS
CITY OF FERRIDAY, ET AL

Appealed from CONCORDIA Parish Case No. 36358

BEFORE JUDGES:

Hon. Ned E. Doucet, Jr.
Hon. Billie Colombaro Woodard
Hon. Elizabeth A. Pickett

As counsel of record in the captioned case, you are hereby notified that the application for rehearing filed by Town of Ferriday has this day been

DENIED

FOR THE COURT

Kenneth J. deBlanc
Clerk of Court

cc:

Shone Pierre Baker, Counsel for the Appellee
Linda Suzanna Harang, Counsel for the Appellee
Charles Shelby Norris, Jr., Counsel for the Appellee
Lisa Cutitto Winter, Counsel for the Appellee
John Powers Wolf III, Counsel for the Appellee
Randall Brian Keiser, Counsel for the Appellant
Anna Kay Brakenridge, Counsel for the Appellant

Appendix E

The Supreme Court Of The State Of Louisiana

GLORIA B. MARTELLO

VS. **NO. 2002-C-1514**

CITY OF FERRIDAY AND OWEN AND WHITE, INC.

IN RE: Ferriday City of etal; - Defendant; Applying for Writ of Certiorari and/or Review, Parish of Concordia, 7th Judicial District Court Div. A, Nos. 36,358-A; to the Court of Appeal, Third Circuit, No. 01-0240

June 7, 2002

Denied.

BJJ
PFC
CDK
JPV
CDT
JTK
JLW

Supreme Court of Louisiana
June 7, 2002

_____

Deputy Clerk of Court
For the Court